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Supreme Court of the United States

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BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., HARBERT INTERNATIONAL, INC., AND HARBERT CORPORATION,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the *Ex Post Facto* clause of the United States Constitution (or other recognized protections against retroactivity) prohibit Congress from amending the False Claims Act to allow the government to resuscitate claims that were time-barred when brought?

PARTIES TO THE PROCEEDING

Petitioners Bill Harbert International Construction, Inc. ("BHIC"), Harbert International, Inc. ("HII"), and Harbert Corporation ("HC") appeared as defendants in the United States District Court for the District of Columbia and were parties to the consolidated appeals before the United States Court of Appeals for the District of Columbia Circuit. Appellants Bilhar International Establishment, Harbert Construction Services (U.K.) Ltd., Roy Anderson and Bill L. Harbert also appeared as defendants in the district court and as parties to the consolidated appeals, but they are not parties to this Petition.

In addition to those parties identified above, the following parties appeared before the district court but were terminated prior to judgment and were not parties to any of the consolidated appeals: defendants ABB ASEA Brown Boveri, Ltd., ABB SUSA, Inc. (f/k/a/ Sadelmi U.S.A., Inc.), American International Contractors Inc., Fru-Con Construction Corporation, George A. Fuller Company, J.A. Jones Construction Company, Inc., Philipp Holzmann A.G. and Sabbia A.G.

Respondent United States of America was a plaintiff in the district court and an appellee in the Court of Appeals. Richard F. Miller was the relator-plaintiff in the district court and an appellee in the Court of Appeals, but he is not named as a respondent in this Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner BHIC has no parent company, and no publicly-held company has a 10% or greater ownership interest in BHIC. BHIC is currently an inactive corporation. Insofar as is relevant to the litigation, BHIC previously was a general contractor engaged in domestic and international construction projects.

Petitioner HII is a wholly-owned subsidiary of HC and is incorporated in Delaware. No publicly-held company owns 10% or more of its stock. Since 1994, HII has been in the business of holding and investing assets, though at the time at issue in this litigation, HII was engaged in the domestic construction business.

Petitioner HC is a privately-held, Delaware-incorporated entity, and no parent company and/or publicly-held company owns 10% or more of its stock. Insofar as is relevant to the litigation, HC's general nature and purpose is to hold and invest assets.

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OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra* 1a-83a) is reported at 608 F.3d 871. The opinion of the district court following trial and post-trial motions (App., *infra* 84a-236a) is reported at 563 F. Supp. 2d 54. Also pertinent is the decision of the district court reported at 505 F. Supp. 2d 1 (App., *infra* 237a-271a).

JURISDICTION

The District Court for the District of Columbia had jurisdiction over the case under 28 U.S.C. § 1331. The appeal to the Court of Appeals for the District of Columbia Circuit was timely following trial and the

resolution of post-trial motions, and that court had jurisdiction under 28 U.S.C. § 1291. The Court of Appeals entered judgment on June 22, 2010 and denied a timely petition for rehearing on October 1, 2010. This Court is asked to exercise its jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"No Bill of Attainder or ex post facto Law shall be passed."

United States Constitution, Article I, Section 9, clause 3.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment V.

* * *

> (b) A civil action under section 3730 [31 USCS § 3730] may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

31 U.S.C. § 3731, as amended in May 2009 (in pertinent part).

STATEMENT

In May 2009, while this case was on appeal in the Court of Appeals for the District of Columbia Circuit, Congress passed the "Fraud Enforcement and Recovery Act of 2009" ("FERA"). That statute made a number of changes to the False Claims Act ("FCA"), including the addition of Section 3731(c), reproduced above, which adds a relation-back provision. The bill also contained the following provision:

> 4(f) EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that—
>
> (1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and
>
> (2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625 (App., *infra* 282a-283a).

Even though the government's FCA claims were time-barred when it filed its complaint in intervention in March 2001, the Court of Appeals held that Paragraph 4(f)(2) of FERA resurrected those claims because this case was still "pending" when the new statute was enacted. In so doing, the Court of Appeals rejected Petitioners' statutory and constitutional objections to this retroactive application of FERA. In particular, the Court held: "The *Ex Post Facto* Clause of the Constitution applies only to penal legislation. The FCA is not penal." 608 F.3d at 879 (App., *infra* 11a) (internal citations omitted).

The facts pertinent to the question presented for review can be summarized relatively briefly. On June 30, 1995, the relator filed in the United States District Court for the District of Columbia a *qui tam*

complaint under seal pursuant to the FCA, alleging illegal conduct by Petitioners HII, HC, BHIC and other corporate defendants, in connection with the bidding of a single contract – designated "20A" – for the laying of sewer pipe through the streets of Cairo, Egypt. The contract had been financed by the U.S. Agency for International Development ("USAID"). It was bid in 1988, awarded to a joint venture in 1989, and performed and paid for between October 1989 and June 1993.

The Civil Division of the Department of Justice did not investigate relator's allegations when it received notice of his complaint in June 1995. Nor did it take any steps to intervene (or to decline to intervene) prior to the running of the statute of limitations in June 1999. *See* 505 F. Supp. 2d at 13 (App., *infra* 257a) ("[I]t is clear that the [Civil Division] attorneys did not exercise due diligence in attempting to uncover the material facts of the causes of action at issue in this case, and that the government's failure to act was unreasonable under the circumstances"). It was not until March 2001 that the government filed its Complaint in Intervention, which added claims involving two other construction projects: designated "07" and "29". The unsealing of the Complaint in Intervention provided Petitioners with their first notice of the FCA claims that had been filed nearly six years earlier in June 1995.

In December 2000, while the relator's complaint was still under seal, the relator amended it to add claims against two individuals: Roy Anderson (president of one of the defendants) and Bill Harbert (owner of one of the defendants). The district court subsequently held that the FCA claims against these

individuals – with the exception of one Contract 29 claim against Roy Anderson – were barred because of:

> the obvious effect that the twelve year tenure of this case had on the presentation of the claims against the defendants. Indeed, the very things that statutes of limitations are designed to prevent – loss of evidence, fading memories, disappearance of documents – were undeniably present in this case. Allowing the relator in this case to bring claims outside of the limitations period notwithstanding the government's unreasonable inaction under the circumstances would fashion a remedy that would run counter to the very purpose of statutes of limitations in general.

505 F. Supp. 2d at 19-20 (App., *infra* 270a-271a).

The district court's findings were based on the loss of witnesses and documents. By 2001, Roy Anderson was suffering from Alzheimer's disease. Bill Harbert suffered from dementia by the time of trial. Moreover, even though the complaint was unsealed in 2001, defendants were still not allowed to begin fact discovery until 2006. And in May 2005 – the year before – USAID officials destroyed an entire filing cabinet of documents pertinent to the case. The district court recognized that "[t]he government's conduct created a situation where we cannot assess exactly what or how much information was lost and what or how much information was important to the defendants' case." (*See* Dkt. No. 693 at 3-4).

Given this loss of testimony and destruction of documents, Petitioners sought an opportunity to demonstrate pretrial the extent of the prejudice and the manner in which the loss of evidence should inform the analysis of their statute of limitations

challenges. The district court refused to conduct any such pretrial inquiry and denied Petitioners' motions to dismiss on statute of limitations grounds.

On appeal, Petitioners advanced numerous grounds for overturning the judgment, including the statute of limitations arguments rejected by the district court. The government argued that its claims against Petitioners had been made timely by FERA – which had been enacted while the appeal was pending. In agreeing that FERA applied retroactively, the Court of Appeals rejected Petitioners' statutory and constitutional challenges to the application of FERA's relation-back provision.[1]

REASONS FOR GRANTING THE PETITION

Historically, this Court has been reluctant to allow Congress to resuscitate stale claims and has recognized that the Constitution has several provisions that preclude such a result. The clearest such constitutional prohibition is the plain text of the *Ex Post Facto* clause. Because that clause has been limited in application to penal statutes, however, there has been much debate over when a statute should be considered "penal" – a debate that has given rise to complicated analyses and several murky determinations in the lower courts.

Perhaps troubled by how fine the line is between considering a given statute "civil" or "penal" – and how severe the consequences of that determination can be – several Justices of this Court have suggested

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[1] The Court of Appeals held, however, that the claims as to 07 and 29 did not relate back, even under FERA. The Court of Appeals also granted Petitioners new trials as to 20A based on evidentiary errors.

that the Court should either extend the application of the *Ex Post Facto* clause or should apply the Due Process (or the Takings or the Contract) clause to ensure that labels do not lead to inconsistent application of the core constitutional restrictions on a legislature's power to revive stale claims. In addition, this Court has expressly laid out a process for evaluating enactments and amendments to civil statutes when parties argue that Congress has acted retroactively. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

From the inception of the FCA, Congress has emphasized that it is a tool for prosecuting fraud promptly, and the statute has "specifically exhorted United States attorneys to enforce the Act diligently." *United States v. Bornstein*, 423 U.S. 303, 316 n.11 (1976). Indeed, 31 U.S.C. § 3730(a) continues to instruct: "The Attorney General diligently shall investigate a violation under section 3729." As the district court found, the government ignored that mandate here. Nevertheless, the Court of Appeals held that FERA has changed the FCA in such a manner that the government may avoid the statute of limitations, no matter how long the delay.

As a result, this case squarely presents the question whether the Constitution allows Congress to resuscitate the government's time-barred FCA claims. FERA's supposed retroactivity has already divided those lower courts that have had occasion to consider the question. And, although Petitioners argued to the Court of Appeals that it should construe the statute in accordance with this Court's principles of constitutional avoidance and the presumption against retroactivity, the Court of Appeals refused to do so. On each of these three grounds, this

is an appropriate case for the grant of a writ of certiorari.

I. THE RETROACTIVE APPLICATION OF FERA'S AMENDMENTS TO THE FCA BY THE COURT OF APPEALS CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. The Constitution Restrains Congress's Ability to Legislate Retroactively, and the Restraints Apply to Civil as Well as Criminal Statutes.

The decision of the Court of Appeals below contravened both the "obvious purpose" of a statute of limitations – to "encourage the prompt presentation of claims," *United States v. Kubrick*, 444 U.S. 111, 117 (1979) – and the general presumption against retroactivity. This Court explained that presumption in *Lynce v. Mathis*, 519 U.S. 433 (1997):

> This doctrine finds expression in several provisions of our Constitution. The specific prohibition on *ex post facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.

Id. at 439-40 (internal citation omitted). Indeed, the Court has characterized Congress's extension of a statute of limitations to allow prosecution of

previously barred claims "manifestly *unjust and oppressive*," because "allowing legislatures to pick and choose when to act retroactively, risks both 'arbitrary and potentially vindictive legislation,' and erosion of the separation of powers." *Stogner v. California*, 539 U.S. 607, 611 (2003) (citation omitted; emphasis in original).

Nor has this reluctance to countenance retroactive legislation been limited to criminal statutes. To the contrary, it applies also to retroactive civil penalties. *See Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (plurality) (applying the Takings Clause to retroactive civil legislation); *id.* at 538-39 (Thomas, J., concurring in result, but expressing willingness to apply *Ex Post Facto* clause); *id.* at 539-50 (Kennedy, J., concurring in result, but applying Due Process Clause); *see also Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 971 (2d Cir. 1985) ("Retroactive application of the treble damages provision [of the Trademark Counterfeiting Act of 1984] could raise constitutional questions concerning both the *Ex Post Facto* clause, U.S. Const., art. I, § 9, cl. 3, and the Due Process Clause of the Fifth Amendment; we therefore select the construction that renders constitutional analysis unnecessary"); *Snowden v. Lexmark Int'l, Inc.*, 237 F.3d 620, 624 (6th Cir. 2001) (statutes [there, civil RICO] that give rise to both criminal and civil causes of action should be interpreted, for retroactivity purposes, as criminal statutes and thus subject to the *Ex Post Facto* clause). Indeed, this Court has concluded that there should be no distinction between civil and criminal forms of action for the analogous question whether the government is required to cease enforcing unconstitutional laws. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).

> Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule. Our approach to retroactivity heeds the admonition that "the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently."

Id. (internal citations omitted).

At the time the Constitution was drafted, it was generally understood that Congress could not make a person forever subject to a *qui tam* action, as the Court of Appeals held Congress has done through FERA. *See Adams v. Woods*, 6 U.S. (2 Cranch) 335 (1805).[2] In *Adams*, Chief Justice Marshall applied a statute of limitations that governed prosecutions,

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[2] To be sure, the *Ex Post Facto* clause is most frequently invoked in – and sometimes held to be limited to – criminal actions that are denominated as such. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) (opinion of Chase, J.) and its reference to the English tradition of enacting bills of "pains and penalties." But this is more characterization than substance. Indeed, Chief Justice Story considered the reference to "criminal matters" a misconstruction of English jurisprudence. He also found it inconsistent with the complementary nature of the protections against impairment of the obligation of contracts and the *Ex Post Facto* clause, which, he said, together "afford a complete protection to vested rights of property." *Green v. Biddle*, 21 U.S. (8 Wheat) 1, 29-30 (1823).

trials, and punishments to bar a *qui tam* action, recognizing that the proper focus was not on the form of action but on the *offence*. *Id.* at 341. Noting that the offence could be addressed through two criminal prosecutions (an indictment or an information) or one civil one (a *qui tam* action), the Chief Justice concluded that placing restrictions on the ability to recover a fine or forfeiture by criminal means without placing the same restriction on the civil means of recovery would be unaccountable legislative capriciousness. *See id.* To hold otherwise "would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Id.*; *see also Burgess v. Salmon*, 97 U.S. 381, 382, 384 (1878).

Today, it remains true that when the purpose of enacting a civil statute is "to impose punishment," the *Ex Post Facto* clause applies without further analysis. *Smith v. Doe*, 538 U.S. 84, 92 (2003). And, even when the articulated purpose is not punishment, the court must still inquire whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Id.* (citation omitted). The Court of Appeals conducted no such inquiry. It should have done so.

B. This Court Should Make it Clear that Because the FCA is Penal, the Amendments Cannot be Applied Retroactively.

When it enacted the FCA in 1863, Congress expressly stated that the FCA was "'for the purpose of punishing and preventing . . . frauds,'" thereby marking the statute as penal. *Bornstein*, 423 U.S. at

310 n.5 (*quoting* Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (remarks of Sen. Howard) and referring to *id.*at 955 (remarks of Sen. Wilson)). This is hardly surprising. After all, even though the *qui tam* action is civil in form, it is a means of collecting a penalty owed to the state. *Qui tam* actions preceded the Magna Carta and paid "common informers" to collect penalties for the Crown. *See Marvin v. Trout*, 199 U.S. 212, 225 (1905); *Robertson v. United States ex rel. Watson*, 560 U.S. __, 130 S. Ct. 2184, 2188 (2010) (dissent observing that the practice in England and early America was that individuals could bring prosecutions – but "as an exercise of sovereign power – the private party acting on behalf of the sovereign, seeking to vindicate a public wrong"); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271-72 (1989) (distinguishing between statutes to recover "amercements" to the Crown or damages to a private litigant); *Schreiber v. Sharpless*, 110 U.S. 76, 79-80 (1884) (a *qui tam* action [there for copyright infringement] is a suit to recover penalties and forfeitures attendant upon the violation of a federal statute).[3]

Originally, the FCA was a single statute containing both criminal and civil penalties, and for almost a century, the civil penalties were triggered only upon a finding of liability under the criminal provisions. *See Rainwater v. United States*, 356 U.S. 590, 592 n.8 (1958). Accordingly, consistent with *Adams* and later precedents, this Court has applied to the *civil* provisions of the FCA the principles of statutory construc-

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[3] In *United States v. NEC Corp.*, 11 F.3d 136, 138 (11th Cir. 1993) and its progeny, several courts have completely flipped this holding in classifying the damages as "compensatory" to the *relator*, the opposite of what this Court concluded in *Schreiber*.

tion applicable to *criminal* statutes. *Id.* at 592 (recognizing that for penal statutes "the scope of these provisions should be confined to their literal terms" while ascribing them fair meaning in accordance with Congress's intent); *Bornstein*, 423 U.S. at 313 n.8 (construing the civil provisions meant "actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible [of] numerous definitions"). The statute still contemplates that a relator may in some circumstances *conduct* an action, but the government will *prosecute* it. *Compare* 31 U.S.C. § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action") *with* 31 U.S.C. § 3730(c)(1) ("If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action").[4] The punitive character of the FCA thus puts it well within the scope of the *Ex Post Facto* Clause.

It is true, however, that there have been times when this Court has treated the FCA more as a civil than a criminal statute (just as there have been times when it has done the opposite). In 1943, the Court

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[4] In *3M Co. v. Browner*, 17 F.3d 1453, 1456, 1460 (D.C. Cir. 1994) the Court of Appeals for the District of Columbia Circuit determined that the statute of limitations for actions by the government "to recover fines, penalties and forfeitures" – which it acknowledged were a form of punishment – applied to administrative proceedings, in part because agency attorneys perform "prosecuting functions" and its hearing officers thus need to be independent of an agency's prosecutors.

characterized the statute as not giving rise to double jeopardy (not by reference to the historical status of the statute or type of action but by reference to the amount of the penalty). *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943) (concluding that the statute was designed "to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole").[5] Nevertheless, *Rainwater* and *Bornstein*, *supra* – both of which came after *Hess* – resumed the traditional treatment of *qui tam* actions by applying criminal statutory construction principles to the civil provisions of the FCA. And in *United States v. Halper*, 490 U.S. 435 (1989), this Court held that the Double Jeopardy Clause prevented a medical doctor who had been convicted under the criminal provisions of the FCA from being punished again under the civil provisions. In reaching that conclusion, the Court recognized that retribution and deterrence are the "traditional aims of punishment" and "are not legitimate nonpunitive governmental objectives." *Id.* at 448. It concluded, therefore, that a civil sanction that serves a retributive or deterrent (in addition to a remedial) purpose, is punishment. *Id.*

Almost immediately, however, certain justices began questioning whether the analysis in *Halper* was workable. *See, e.g., Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 804 (1994) (Justices Scalia and Thomas, dissenting). This dissatisfaction culminated in *Hudson v. United States*, 522 U.S. 93 (1997), in which the Court found that an action brought by the

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[5] That was literally true in 1943, because half of the then double damages went to the relator. *Id.* at 540.

Office of the Comptroller of the Currency for civil penalties and debarment did not violate the Double Jeopardy Clause. It reached this result by applying the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).[6]

Some have taken *Hudson* as a repudiation of constitutional protections for civil proceedings under the FCA. But the FCA was not at issue in *Hudson*. And if the Court of Appeals in this case had applied *Kennedy*'s seven-factor test, it could readily have concluded that the FCA – unlike the civil penalties at issue in *Hudson* – is penal in nature. Instead, the Court of Appeals apparently thought that the fact that *Hudson* stepped away from *Halper*'s analysis established definitively that the FCA is not penal. It did not.

The cases since *Hudson* have primarily focused on the effect of the 1986 amendments to the FCA, when Congress increased the damages from double to treble, increased the amounts of civil penalties, and decreased the percentage given to a relator. Congress also added a tolling provision, allowing the government to take action within three years of the time notice is provided to it – an assurance that the government would have time to investigate even if a relator filed at the very end of the six-year statute of limitations. *See* 31 U.S.C. § 3731(b)(2).[7]

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[6] In *Kennedy*, the Court held it unconstitutional to impose forfeiture of citizenship for failure to comply with draft and/or induction requirements: such punishment required the full panoply of Fifth and Sixth Amendment safeguards. *Id.* at 169-70.

[7] The amendments were not designed to excuse or protect governmental inaction, however. *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) ("One reason

This Court has decided two cases focusing on the significance of the increased penalties in the 1986 amendments. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000), the Court looked at the assessment it had made of treble damages under the antitrust laws to characterize the sanction as penal.[8] A different, though related, question about the 1986 amendments was presented in *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003), where a local government argued that treble damages were punitive enough to preclude suits against municipalities – even though the FCA had originally authorized such suits. In that context, this Court observed that treble damages were both punitive and compensatory, and that "the force of this punitive nature in arguing against municipal liability is not as robust as if it were a pure penalty in all cases." *Id.* at 131-32. The fact that municipalities remained proper defendants does not in itself answer the question whether the nature of the FCA or its penalties precludes resurrecting stale claims.

In sum, there are many factors that establish that, in this context at least, the FCA should be viewed as

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for the 1986 amendments was to prod the government into action, rather than allowing it to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government.").

[8] The *Stevens* Court quoted from *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 639 (1981). "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.") That was clearly evident in this case, where the jury awarded damages on 20A of $29,920,000. After the district court trebled the single damages and added civil penalties for each invoice, the total damages on 20A exceeded $90,000,000.

penal. There is a clear Congressional statement at the time of the statute's enactment setting forth the purpose as retribution and deterrence. In adopting the FCA as a *qui tam* statute, Congress legislated against the backdrop of a type of statute accorded *Ex Post Facto* protections. This Court has applied statutory construction principles used with criminal statutes in assessing the civil provisions of the FCA and has recognized that the penalties imposed have punitive elements. Nevertheless, the Court of Appeals in this case – and other courts – are interpreting *Hudson* in a way that ignores Congress's intent and the decisions of this Court addressing the character of the FCA itself and *qui tam* actions in general. Therefore, this Court should grant the writ and clarify that Congress cannot retroactively resurrect a time-barred complaint.[9]

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[9] This Court has addressed other questions about the FCA since *Cook County*. *See Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005) (analogous state statute of limitations governs retaliation claims under the FCA); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007) (determining that when the government intervenes but a relator is determined not to be an original source, the government's claim may proceed nonetheless); *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008) (FCA requires proof that defendants intended a false statement be material to the government's decision to pay the false claim); *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009) (when the government does not intervene, the relator has only thirty days to take an appeal); *Graham County Soil & Water Conservation Dist. v. United States*, 559 U.S. __, 130 S. Ct. 1396 (2010) (disclosure bar includes state and federal administrative reports). But it has not reached the question presented by this case.

II. LOWER FEDERAL COURTS ADDRESSING FERA'S SUPPOSED RETROACTIVITY ARE COMING TO OPPOSITE CONCLUSIONS.

As noted above, most of the FERA amendments were expressly to apply to "conduct on or after the date of enactment." Pub. L. No. 111-21, § 4(t), 123 Stat. 1617, 1625 (App., *infra* 282a-283a). One exception – not directly implicated here – stated that the amendments to Section 3729(a)(1) "shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act that are pending on or after that date." *Id.* at § 4(f)(1) (App., *infra* 283a). That exception spawned immediate and prolific litigation. As a result, in the eighteen months since FERA was enacted, several Courts of Appeals and at least one district court in each circuit have considered whether Congress intended the amendment to reach "all causes of action" – including complaints that had been filed years ago – or whether it intended to reach only "requests for payment" (in accordance with the definition of "claims" in the FCA). In the latter case, of course, the amendment would affect only conduct that was ongoing at the time FERA was enacted.

If the amendment is construed to reach all *cases* that were pending on June 7, 2008, it is retroactive, and the courts that have reached the question have been divided on whether the *Ex Post Facto* clause would preclude the amendment so construed. *See United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 752 (S.D. Ohio 2009) (if the statute were retroactive, it would offend the *Ex Post Facto* Clause); *United States ex rel. Putnam v. Eastern Idaho Regional Med. Ctr.*, 696 F. Supp. 2d

1190, 1196 (D. Idaho 2010) (same); *United States ex rel. Baker v. Cmty. Health Sys.*, 709 F. Supp. 2d 1084, 1108-12 (D.N.M. 2010) (same); *but see United States ex rel. Drake v. NSI, Inc.*, 3:94-cv-963 (WWE), 2010 U.S. Dist. LEXIS 87983 (D. Conn. Aug. 26, 2010) (on reconsideration relying on Second Circuit precedent but concluding that there is no constitutional prohibition against retroactive application).

As to the courts that have not expressly addressed the constitutional question, some have found it not to be squarely presented, and others have read the text to avoid the question. But whether or not they have set forth a constitutional analysis, the courts that allow retroactivity have necessarily found no constitutional impediment to Congress's retroactive legislation. *See United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010) ("Steury's complaint was pending on June 7, 2008. We therefore assess Steury's claim under the current § 3729(a)(1)(B)"); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010) (applying the amended provision "[b]ecause Kirk's claim was filed in March 2005, and was pending as of June 7, 2008"); *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 n.* (4th Cir. 2010) ("Because we ultimately conclude that Owens's claim fails in any event, we shall assume that the amended version, under which Owens need not prove First Kuwaiti sought 'to get a false or fraudulent claim paid or approved,' applies. 31 U.S.C. § 3729(a)(2)").[10]

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[10] A district court within that circuit has expressly applied the amendment retroactively as well. *See United States ex rel. Carter v. Halliburton Co.*, 1:08cv1162 (JCC), 2009 U.S. Dist. LEXIS 63649, at *15 n.3 (E.D. Va. July 23, 2009).

One district court within the Seventh Circuit agreed. *United States ex rel. Walner v. Northshore Univ. Healthsystem*, 660 F. Supp. 2d 891, 896 n.3 (N.D. Ill. 2009) (applying the amended statute).[11]

The first court to reach the constitutional question was the District Court for the Southern District of Ohio, in the *Allison Engine* case. That case is currently on appeal before the Sixth Circuit Court of Appeals,[12] and the briefing has encompassed both the *Ex Post Facto* and Due Process Clauses. The district court applied the *Kennedy* factors in holding that the FCA is penal and retroactivity impermissible. That court noted in particular the several times when Senators Patrick Leahy and Charles Grassley, two of FERA's co-sponsors, had referred to FERA as a means to "track down and punish" violators, ensure that fraud not go "unprosecuted and unpunished" and to "ensure punishment." 667 F. Supp. 2d at 754. Senate Majority Leader Harry Reid likewise characterized FERA as providing funding and tools to "prosecute and punish." *Id.*

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[11] Another district court within the Seventh Circuit reached the opposite conclusion. *Mason v. Medline Indus.*, Civil Action No.: 07 C 5615, 2010 U.S. Dist. LEXIS 15260, at *8-9 (N.D. Ill. Feb. 18, 2010) (amendment does not apply retroactively, because "claims" are as defined under the statute).

[12] In *United States ex rel. Snapp, Inc. v. Ford Motor Co.*, 618 F.3d 505 (6th Cir. 2010), the Court of Appeals for the Sixth Circuit recognized that there was a divergence of opinion but applied the prior statute because it concluded that the amendment was immaterial to the question before it. The same Court also found that it did not need to reach the question in *United States v. United Techs. Corp.*, Nos. 08-4256/08-4257, 2010 U.S. App. LEXIS 23710 (6th Cir. Nov. 18, 2010).

As noted above, district courts within the Ninth and Tenth circuits have agreed with the *Allison Engine* analysis and conclusion. On the other hand, the District Court for the District of Connecticut in *Drake*, while agreeing that it needed to reach the constitutional analysis, still concluded that the statute was remedial and its sanctions were "disgorgement" and civil, albeit "slightly punitive in nature." 2010 U.S. Dist. LEXIS 87983, at *22-26. Interestingly enough, even though the *Allison Engine* and *Drake* courts reached opposite *results*, they differed as to only two of the seven *Kennedy* factors – and, even as to those, their conclusions were somewhat equivocal. It is also notable that the *Drake* court refused to certify its decision for immediate appeal but did observe:

> This Court believes that upon more briefing, the Court of Appeals may revisit its holding in *Kirk*. This case at this juncture, however, is not the appropriate vehicle for doing so. Although the Court agrees that there is substantial ground for difference of opinion on the issue and that it is a controlling question of law, immediate appeal would not materially advance the ultimate termination of this litigation.

United States ex rel. Drake v. NSI, Inc., 3:94-civ-963 (WWE), 2010 U.S. Dist. LEXIS 111976, at *6 (D. Conn. Oct. 21, 2010).

It should also be said that several courts have *agreed* with the conclusion of the district courts in the Sixth, Ninth and Tenth Circuits without reaching the constitutional question. They were able to do so by construing the amendment in a way that presumes Congress acted constitutionally. In this regard, the courts that have employed constitutional

and/or statutory analysis to hold that *claims* should be construed as that term is defined in the FCA (*i.e.*, a claim for payment) are: the Court of Appeals for the Eleventh Circuit and district courts within the First,[13] Third,[14] Sixth, Eighth,[15] Ninth, Tenth and District of Columbia Circuits.[16] *See Hopper v. Solvay*

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[13] The Court of Appeals has decided two post-FERA cases. It found that it did not need to reach the question in *United States ex rel. Loughren v. Unum Group*, 613 F.3d 300, 307 n.7 (1st Cir. 2010) ("We need not decide whether the FERA applies retroactively here because under either the former or amended version of section 3729(a)(2), our analysis of Relator's claims against Unum will be the same. As Unum notes, 'under both versions, [Relator] was required to prove falsity, materiality, and scienter'"). In *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 30 (1st Cir. 2009), the Court applied the *Allison Engine* intent requirement without addressing FERA's retroactivity.

[14] *E.g.*, *United States v. Aguillon,* 628 F. Supp. 2d 542, 550-51 (D. Del. 2009) (applying the *Landgraf* analysis and finding that FERA would have retroactive effects, and that Congress had not given "the requisite instruction").

[15] *See United States ex rel. Burroughs v. Cent. Arkansas Dev. Council*, 4:08CV2757 JMM, 2010 U.S. Dist. LEXIS 55361, at *6-7 (E.D. Ark. May 10, 2010) (refusing to certify an immediate appeal because in finding that "claim" referred to a defendant's request for payment, the court had followed the majority position and there was not a substantial ground for difference of opinion on the issue). The Eighth Circuit Court of Appeals found that it did not need to reach the question in *United States v. Hawley*, 619 F.3d 886, 894 & n.3 (8th Cir. 2010) (finding that under either the amended or unamended statute the government's claims survive, but instructing the district court on remand to address the statutory and constitutional issues should the government seek to apply the amended statutory provision).

[16] The Court of Appeals has just decided a case involving the provision, but as to FERA's retroactivity, it observed merely:

> On appeal, although the government still maintains that the district court erred by failing to give retroactive effect

Pharms., Inc., 588 F.3d 1318, 1327 n.3 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3465 (June 21, 2010) ("While this *case* was pending on and after June 7, 2008, the relators do not allege that any *claims*, as defined by § 3729(b)(2)(A), were pending on or after June 7, 2008. Therefore, we conclude the Fraud Enforcement and Recovery Act does not apply retroactively to this case.").

In short, the question whether the *Ex Post Facto* clause applies to the FCA is troubling the lower courts, and – unlike the Court of Appeals here – even the court that concluded that the *Ex Post Facto* clause did not prohibit retroactive application of the new statute concluded that the question was close and uncertain. This Court should grant a writ of certiorari to provide certainty.

> to the 2009 amendments, it nonetheless assures us that the issue "has no bearing on the outcome of this case." Appellee's Br. 53. Taking the government at its word, we shall assume the correctness of the district court's decision on this point and henceforth refer only to the FCA's pre-2009 language.

United States v. Sci. Applications Int'l Corp, No. 09-5385, 2010 U.S. App. LEXIS 24808, at *17 (D.C. Cir. Dec. 3, 2010). The district court had held that the statute could not be applied retroactively. 653 F. Supp. 2d 87, 106-07 (D.D.C. 2009). A district court that appeared to disagree changed its ruling on rehearing. *See United States ex rel. Westrick v. Second Chance Body Armor, Inc.* 709 F. Supp. 2d 52, 56 (D.D.C. 2010) ("However, it was error to conclude that FERA's amended provisions applied retroactively to the claims at issue here. The word 'claims,' as it applies in the relevant provision, refers to 'a defendant's request for payment' and not to 'civil actions for FCA violations.' Because the complaint does not allege that any requests for payment were pending after 2003, when Second Chance discontinued selling Zylon vests, the unamended false statements provision, 31 U.S.C. § 3729(a)(2) (2006), applies." (internal citation omitted).)

III. WITHOUT REGARD TO THE CONSTITUTIONAL RESTRICTIONS, THIS COURT HAS SET IN PLACE SAFEGUARDS AGAINST THE RETROACTIVE APPLICATION OF A STATUTE, WHICH SAFEGUARDS WERE NOT APPLIED BY THE COURT OF APPEALS.

In the Court of Appeals, Petitioners explained that the natural reading of the statute was that Congress did not intend to resurrect claims at all. This, of course, answers the primary question raised by *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), because courts are to presume that Congress did not intend to legislate retroactively as to even purely civil and remedial statutes unless Congress clearly and unequivocally states otherwise. Yet the Court of Appeals concluded that it needed go no further than look at the phrase "cases pending" to conclude that Congress *unmistakably* intended the amendment to apply to this case. 608 F.3d at 879 (App., *infra* 12a-13a).[17]

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[17] If the Court of Appeals had proceeded to Steps 2 and 3 of the *Landgraf* analysis, it would have been compelled to reject the application of the amendment. There is no dispute that it has an impermissible retroactive effect, and the versions of the bill that Congress was considering applied only to cases filed (and in some cases to conduct) after the date of enactment, until the final version that was accepted in conference without any preceding floor debate in either chamber. *Compare* S. 386, 111th Cong. § 4(b) (as passed by Senate, Apr. 28, 2009) (except for the amendments to section 3729(a)(1), "[t]he amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment"); H.R. 1788 § 7 (as reported by H. Comm. on the Judiciary, May 5, 2009) (The amendments to Section 3731(b)(1) "shall apply only to cases filed on or after the date of the

Even if the Court of Appeals were applying the first step of *Landgraf* to a statute that did not have any constitutional implications, it needed to do more than look at the date of enactment to determine whether the amendment did in fact explicitly resurrect claims *in this case.* This Court has held that an analysis of this kind is required because the dangers in *all* retroactive legislation require a court to find that "Congress has directed with the requisite clarity that the law be applied retrospectively" – a standard that is "demanding" and requires language "so clear that it could sustain only one interpretation." *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001) (*quoting in part Lindh v. Murphy*, 521 U.S. 320, 328, n.4 (1997)). This would be particularly true in addressing any provision that might be construed to enliven dead claims. Indeed, this Court applied such an analogy in rejecting retroactive application of the 1986 amendments of the FCA:

> The 1986 amendment would revive that action, subjecting Hughes to previously foreclosed *qui tam* litigation, much like extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a mori-

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enactment of this Act") *with* S. 386, 111th Cong. § 4(f) (as passed by House, May 6, 2009) ("EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that . . . (2) section 3731(b) of title 31, as amended by subsection (b) . . . shall apply to cases pending on the date of enactment"). As this Court has observed, one cannot infer a definite and focused intent when there were no comments on the meaning or need for the provision before its passage. *See Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark").

> bund cause of action . . . even if a cause of action remained open to some other party.

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 950 (1997). And, as the Court of Appeals for the Third Circuit observed when analyzing the effect of amending the Sarbanes-Oxley Act, the question whether Congress intended to enliven dead claims requires a distinct express statement by Congress. *Lieberman v. Cambridge Partners, L.L.C.*, 432 F.3d 482, 488 (3d Cir. 2005).

In adopting the relation-back provision at issue here, Congress did not amend or repeal the six-year statute of limitations or the three-year tolling provision. The statute of limitations and tolling provision were both clearly established at the time the relator's complaint was filed in 1995. Yet the construction of FERA that the government urged – and the Court of Appeals accepted – renders the statute of limitations and tolling provision meaningless as to the government. Indeed, according to the construction the Court of Appeals applied, the new relation-back provision was explicitly and unequivocally intended to allow the government a "free pass" for its lack of diligence and to exempt the government from any statute of limitations. If the government and Court of Appeals are correct, the government could wait until all defense witnesses were unavailable and all document preservation requirements had expired before deciding whether to intervene in any *qui tam* action – fully immunized from any consequences by its ability to point to the secret complaint and FERA's relation-back provision.

Surely the inconsistency such a construction creates within the statutory provision itself militates against finding Congress's intent in this regard

unmistakable. It is possible, moreover, to read the statutory provisions so that they are in harmony. If, for example, the government were to file a complaint in intervention that adds tort claims governed by the three-year limitations period of 28 U.S.C. § 2416(c), it could use the new statute to relate its claims back – even in years four, five, or six – so long as they arise from the same conduct, transactions, or occurrences as the relator's FCA claim.

Moreover, the words Congress actually chose are at odds with the idea that the amendment was to apply to already-filed complaints. The amendment sets forth a sequence, the first clause of which is conditional, and all of which is in either the present or future tense:

> *If* the Government *elects* to intervene and proceed with an action brought under 3730(b), the Government *may file* its own complaint or *amend* the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, *any such Government pleading shall relate back* to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

31 U.S.C. § 3731(c) (emphasis supplied). This Court credits Congress with paying attention to the tenses it chooses. *E.g.*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987)

("Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option"). In *Gwaltney*, the Court found that "[o]ne of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout § 505" – and it thus concluded that the Clean Water Act did not permit citizen suits for wholly past violations. *Id.* at 59-60; *and see Carr v. United States*, 560 U.S. __, No. 08-1301, slip op. at 7 (June 1, 2010) ("Once a person becomes subject to statute's registration requirements, *which can occur only after the statute's effective date*, that person can be convicted under Section 2250 if he thereafter travels and then fails to register" (emphasis supplied)); *id.* at 10-11 at n. 6 ("Given the well-established presumption against retroactivity . . . it cannot be the case that a statutory prohibition set forth in the present tense applies [retroactively]").

Each step in FERA's relation-back sequence is in the present (or future) tense. The statute says "elects" – not "elected" – to intervene. It permits the government to "file" or "amend" rather than referring to a complaint that has already been "filed" or "amended". If Congress had written the amendment to accomplish what the government advocated and the Court of Appeals found, the new provision would have said: "Any complaint filed by the Government upon intervention relates back to the filing date of the complaint of the person . . . ." Giving meaning to the language as Congress drafted it allows the government to relate back in pending cases – *i.e.*, *qui tam* actions that have been filed under seal but as to which the government had not yet decided to intervene in May 2009 – without offending the presumption against retroactivity and without ren-

dering the statute unconstitutional. The natural construction thus also satisfies the canon of constitutional avoidance,

> a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it. And when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others, as the dissent believes; he seeks to vindicate his own *statutory* rights.

Clark v. Martinez, 543 U.S. 371, 381-82 (2005) (internal citations and quotations omitted; emphasis in original). "[W]here an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 300 (internal citation omitted). The Court of Appeals did not do so here and thereby placed the constitutional question squarely at issue, because it is only "within constitutional limits [that] Congress has the power to enact laws with retrospective effect." *Id.* at 316. As this Court said in *Landgraf*,

> The very labels given "punitive" or "exemplary" damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question. Before we entertained that question, we would have to be confronted with a statute that explicitly authorized punitive damages for preenactment

> conduct. The Civil Rights Act of 1991 contains no such explicit command.

Landgraf, 511 U.S. at 281 (internal citations omitted). Under the reading of the Court of Appeals, the FCA is a statute that explicitly authorizes extending punishment for claims that were barred prior to the amendment . . . precisely what this Court said it needed to be confronted with before it entertained the serious constitutional question. Petitioners pray this Court to grant the writ to address that question.

CONCLUSION

In dismissing the individual defendants in this case, the district court found that the government's delay in deciding whether to intervene had resulted in actual and palpable prejudice. That prejudice is irremediable. No one can restore the documents the government destroyed or reverse the dementia and Alzheimer's disease that afflicted the witnesses who were crucially unavailable at trial. Absent this Court's intervention, what Chief Justice Marshall recognized as "utterly repugnant to the genius of our laws" would, in fact, be the law. Plainly, that is not a good result. Nor can it be squared with our history or long-established rules of jurisprudence.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 08-5390, 08-5391,
08-5392, 08-5393, 08-5394

UNITED STATES OF AMERICA *ex rel.*
RICHARD F. MILLER AND RICHARD F. MILLER,
Appellees

v.

BILL HARBERT INTERNATIONAL
CONSTRUCTION, INC., *et al.*,
Appellants

Appeals from the United States District Court
for the District of Columbia
(No. 1:95-cv-01231-RCL)

Argued December 7, 2009
Decided June 22, 2010

Alfred W. Putman, *June Ann Sauntry*, *Barry Coburn*, *Charles C. Murphy Jr.*, and *Charles S. Leeper* argued the causes for appellants. With them on the briefs were *Michael R. Miner* and *Alicia Hickok*. *Bryan B. Lavine*, *Stephen P. Murphy*, and *Brian P. Watt* entered appearances.

Steve Frank, Attorney, U.S. Department of Justice, and *Paul R. Q. Wolfson* argued the cause for appel-

lees. With them on the brief were *Douglas N. Letter*, Attorney, U.S. Department of Justice, *Keith V. Morgan*, Assistant U.S. Attorney, *Robert B. Bell*, *Jennifer M. O'Connor*, and *Annie L. Owens*. *R. Craig Lawrence*, Assistant U.S. Attorney, and *Daniel S. Volchok* entered appearances.

Before: SENTELLE, *Chief Judge*, GINSBURG and TATEL, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

Separate opinion dissenting from Parts II.A.2 and II.G.4 filed by *Circuit Judge* TATEL.

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PER CURIAM: In this False Claims Act case, the jury found five companies and one individual liable for rigging the bidding on three contracts in Egypt funded by the USAID. Trebling the jury's award, the district court imposed over $90 million in damages. The defendants appeal, challenging several of the district court's rulings, as well as the sufficiency of the evidence adduced against them. For the reasons set forth in this opinion, we conclude (1) that the plaintiffs' claims on two of the contracts are barred by the applicable statute of limitations, and (2) that certain testimony and evidence introduced at trial unfairly prejudiced three defendants. In all other respects, we affirm.

I. Background

Following the 1978 Camp David Accords, the United States agreed to provide economic assistance to Egypt through the U.S. Agency for International Development (USAID), including funding for improving sewer systems in Cairo and Alexandria. The sewer projects were divided into numerous construction contracts and put out for bidding by contractors prequalified by the USAID.

In 1995, Richard Miller, then a Vice President of the J.A. Jones Construction Company (Jones), the 40% partner in a series of identical joint ventures that bid on three of the projects, filed a complaint under the False Claims Act (FCA). 31 U.S.C. § 3729 *et seq*. Enacted during the Civil War, the FCA penalizes knowingly submitting or conspiring to submit false or fraudulent claims to the United States Government, § 3729(a)(1)(A), (C), and authorizes private enforcement through *qui tam* actions, which give individuals knowing of fraud a monetary incentive to come forward, § 3730(b). In his complaint, Miller alleged that in the course of his employment, he discovered that the defendants, other contractors, and a variety of related corporate entities and individuals were all members of a conspiracy to rig the bidding on contracts in Egypt. This so-called Frankfurt Club would meet to discuss upcoming contract bids in Frankfurt, Germany, the home of the conspiracy's leader, Jones's parent corporation, Holzmann, A.G. Miller's complaint focused on the bidding for one particular contract, Contract 20A, and named Holzmann, Jones, Harbert International, Inc. (HII)—Jones's partner on the other side of the joint venture—and several related corporations as defendants.

In accordance with the FCA, Miller filed his complaint *in camera*, and the district court placed it under seal. A *qui tam* relator suing under the FCA brings his case "in the name of the Government," § 3730(b)(1), and his initial complaint remains under seal for sixty days. Before the expiration of that period, the Government must (1) intervene and "proceed with the action, in which case the action shall be conducted by the Government," § 3730(b)(4)(A); (2) "notify the court that it declines

to take over the action, in which case [the relator has] the right to conduct the action," § 3730(b)(4)(B); or (3) petition the court for an extension of the seal period by showing "good cause," § 3730(b)(3). If the Government decides to intervene, it typically does so by filing an amended complaint.

In this case, soon after Miller filed his complaint, the Government opened a criminal investigation into the alleged conspiracy and, fearing that active civil litigation would interfere with that investigation, filed successive motions to keep Miller's complaint sealed. In the meantime, the Government prosecuted many of the participants in the Cairo and Alexandria bid-rigging arrangements, obtaining guilty pleas or convictions from at least five U.S. corporations or individuals.

In February 2001, the Government allowed Miller's complaint to be unsealed and filed its own Complaint in Intervention, taking over control of the case. The Government's complaint adopted the claims that Miller had asserted on Contract 20A and added claims on two other contracts, Contracts 29 and 07, which it characterized as part of the same Frankfurt Club conspiracy. It charged all the defendants with substantive FCA violations for each of the three contracts and with participating in the overarching conspiracy. Miller later amended his complaint to do the same. In essence, Miller and the United States alleged that prior to each contract, some or all of the bidders prequalified by the USAID met in Frankfurt to discuss the bidding. At these meetings or thereafter, the bidders reached an agreement that all but one would either bid high or refrain from bidding, and the winning bidder would pay these cooperators a "loser's fee."

Contract 20A, the first of the three contracts and the only one identified in Miller's original complaint, covered installation of large-diameter, underground sewer pipe in densely populated Cairo neighborhoods. The plaintiffs alleged that the joint venture between HII and Jones (Harbert- Jones), one of three prequalified bidders, sought and received commitments from the other two companies to either overbid or not bid for the contract. Thanks to this agreement, Harbert-Jones ultimately won the contract for $115 million, subsequently paying the other two bidders $2.2 and $3 million for their cooperation. The plaintiffs further alleged that in order to hide $10 million in excess profits, the joint venture engaged in a sale/leaseback transaction with an affiliated corporation.

Contract 29, the second contract, involved the construction of a wastewater treatment plant near Cairo. In this instance, Harbert-Jones allegedly met with the only other prequalified bidder and agreed to lose the bid in exchange for a $4 million loser's fee.

The third contract, Contract 07, covered the construction of sewers in Alexandria. Because this time Harbert-Jones was apparently unable to reach a bid-rigging agreement with all other qualified bidders, it entered into a bilateral agreement with one other bidder. Under that deal, the party that won the contract would compensate the other with a loser's fee. Although the record is unclear on this point, the fee would have been either 1.5 million U.S. Dollars or 1.5 million German Deutschmarks.

As relevant here, the Government's Complaint in Intervention and Miller's amended complaint named the following defendants:

- Holzmann, *see supra* at 4;
- Jones, *see supra* at 3;
- HII, *see supra* at 4;
- Harbert Corporation (HC), HII's parent corporation;
- Bilhar International Establishment (BIE), to which HII assigned the contracts in question after bidding was complete. (We hold, *infra* at 20, that the reference in the original complaint to Harbert International Establishment, Inc., was intended to refer to BIE);
- Harbert Construction Services (U.K.), Ltd. (HUK), a corporation owned 49% by BIE and 51% by a private individual that provided various financial services in connection with the bidding;
- Bill Harbert International Construction, Inc. (BHIC), a corporation which, though inactive at the time of bidding, subsequently took partial ownership of BIE and allegedly provided support for fraudulent billing on inflated invoices as the ill-gotten contracts were completed.
- Bill Harbert, President of HII and a senior executive at other corporate defendants; and
- Roy Anderson, Vice President of HII and President of BIE.

Five years of pleadings, motions, and discovery followed Miller's amended complaint and the Government's Complaint in Intervention. After declaring bankruptcy and settling with the plaintiffs, Holzmann and Jones were each dismissed from the

case. Trial began in March 2007, and following seven weeks of testimony, the jury found for the plaintiffs on every count. This included conspiracy by all defendants, as well as substantive violations by most defendants with respect to most of the contracts. (For some defendants' involvement in some contracts, the district court held that it lacked subject matter or personal jurisdiction. In addition, at the conclusion of testimony, the court found all claims against Bill Harbert were barred by the FCA's statute of limitations.)

The jury found that the United States suffered approximately $34 million in damages from the defendants' conduct. As required by the FCA, the district court trebled these damages and added statutory penalties. *See* 31 U.S.C. § 3729(a). After subtracting amounts previously recovered by the United States, it awarded $90.4 million in damages. The defendants moved for judgment notwithstanding the jury's verdict on a variety of issues and sought a new trial on others. Rejecting the defendants' legal arguments and finding the jury's verdict amply supported by the evidence, the district court denied all of the defendants' motions in a 125-page opinion. *Miller v. Holzmann*, 563 F. Supp. 2d 54 (D.D.C. 2008). This appeal followed.

II. Analysis

The defendants raise a number of issues. We first address two threshold issues—whether the statute of limitations bars any claims against the defendants and whether the Foreign Assistance Act preempts the False Claims Act. We next address personal jurisdiction over HUK, the contradiction at trial of a stipulation regarding BHIC's existence, and the district court's decision to preclude BIE from

contesting liability. Finally, we address the defendants' arguments concerning four evidentiary issues and the sufficiency of the evidence.

A. Statute of Limitations

As relevant here, the FCA precludes a civil action filed "more than 6 years after the date on which the violation . . . is committed." 31 U.S.C. § 3731(b)(1). The violations at issue here occurred in the late 1980s and the 1990s. Miller filed his initial complaint in 1995 alleging the defendants violated the FCA in their dealings associated with Contract 20A. The Government filed its Complaint in intervention in 2001, adopting Miller's claims concerning Contract 20A and adding its own claims concerning Contracts 07 and 29. In his Third Amended Complaint, filed in 2006, Miller too added claims concerning the latter contracts.

The defendants argue the statute of limitations bars all the Government's claims and bars Miller's claims concerning Contracts 07 and 29 because the events giving rise to those claims occurred more than six years before the claims were brought. The Government and Miller argue the claims relate back to Miller's initial complaint and therefore have the benefit of the earlier filing date.[1] BIE argues sepa-

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[1] In a post-argument letter to the court, the Government belatedly argues at least one claim concerning Contract 29 was timely without regard to relation back because the underlying events occurred less than six years before the Government filed its Complaint in Intervention. Because the Government failed to raise this point in the district court or in its briefs in this court, the point is doubly forfeit and we do not consider it. *See Bryant v. Gates*, 532 F.3d 888, 898 (D.C. Cir. 2008). With the exception of the arguments regarding recent decisions of the Supreme Court, the same is true for the other arguments the

rately the claims against it do not relate back because it was added as a defendant after the statute of limitations had run.

The district court held the Government's claims concerning Contracts 07, 20A, and 29, as well as Miller's claims concerning Contracts 07 and 29, relate back to Miller's initial complaint. *See* 563 F. Supp. 2d at 139-42. We review *de novo* whether "claims are barred by the statute of limitations," *Jung v. Mundy, Holt & Mance, PC*, 372 F.3d 429, 432 (D.C. Cir. 2004), and hold the statute of limitations does not bar the Government's claims concerning Contract 20A because they relate back to Miller's timely filed complaint but does bar all claims, both the Government's and Miller's, concerning Contracts 07 and 29. The district court also rejected BIE's separate argument, as do we, because BIE should have known within the required time it was an intended defendant.

1. Relation Back Under the FCA

At the time of trial the FCA did not by its terms address relation back, but the district court held the FCA nonetheless implicitly permitted an otherwise untimely claim to relate back under what is now Federal Rule of Civil Procedure 15(c)(1)(B). *See* 563 F. Supp. 2d at 139–40 n.137 (interpreting what was then Rule 15(c)(2)). In 2009, after trial but before this appeal was briefed, the Congress amended the FCA expressly to provide for relation back. The statute now reads:

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parties raised in the various post-argument letters. *See id.*; Fed. R. App. P. 28(j).

> For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

31 U.S.C. § 3731(c).

The statute as thus amended applies to this case on appeal. Although most of the 2009 amendments to the FCA apply only "to *conduct* on or after the date of enactment," the provision permitting relation back was made expressly "appl[icable] to cases pending on the date of enactment." Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(f)(2), 123 Stat. 1617, 1625 (emphasis added).

The defendants' arguments that the amended statute cannot constitutionally be applied to this case are unpersuasive. The *Ex Post Facto* Clause of the Constitution applies only to penal legislation. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91, (1798) (opinion of Chase, J.); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 n.19 (1994) (citing *Calder*). The FCA is not penal. *See Hudson v. United States*, 522 U.S. 93, 100–03 (overruling Court's prior decision that a civil FCA proceeding could be criminal under the Double Jeopardy Clause). We need not address the arguments concerning the Takings and the Due Process Clauses of the Constitution because they were raised in only two conclusory sentences. *See Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1312 (D.C. Cir. 2010) ("Federal courts should not . . . decide [a] constitutional question unless it is presented with the clarity needed for effective

adjudication.") (brackets in original) (internal quotation marks omitted); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("A litigant does not properly raise an issue by addressing it in a cursory fashion with only bare-bones arguments.") (internal quotation marks omitted).

The defendants argue the Congress did not intend that the amendment reach cases in which the Government had already intervened because it referred to "cases pending" rather than to "*all* pending cases." In *Lindh v. Murphy*, 521 U.S. 320 (1997), upon which the defendants rely, the Supreme Court discussed in a footnote the use and omission of "all" and "any" in statutory provisions. *See id.* at 328–29 n.4. There the Court interpreted a retroactivity provision that on its face applied only to one of several chapters in the statute. *See id.* at 326–27 (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 107, 110 Stat. 1214, 1226 ("Chapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act")); *see also Martin v. Hadix*, 527 U.S. 343, 356 (1999) (explicating *Lindh*). Unlike the statute interpreted in *Lindh*, the clause in the FERA specifying the effective date of the provision concerning relation back is not limited in scope to a particular type of case or subset of cases.

The defendants, citing the Supreme Court's recent decision in *Carr v. United States*, 560 U.S. __, No. 08-1301 (June 1, 2010), would also have us infer, from a temporal sequence or choice of verb tense, that Congress intended to limit the effect of the statute to cases in which the Government has not yet intervened. We have no need to draw inferences, however, when the statute is clear on its face. *See Robinson v.*

Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal quotation marks deleted). The amendment "applies to cases pending on the date of enactment." Pub. L. No. 111-21, § 4(f)(2), 123 Stat. 1617, 1625. Because this case was pending on the date of enactment, the amendment applies. Q.E.D.

The defendants urge us to adopt an "equitable doctrine of relation back" and so not to allow the Government's claims to relate back in this case because it delayed filing its own complaint and unsealing Miller's complaint until several years after the statute of limitations had run. We reject this argument because the statute, as amended, permits both relation back and—if good cause be shown—maintaining the relator's complaint under seal indefinitely beyond the sixty days. *See* 31 U.S.C. § 3730(b)(3).

Although the Government may take advantage of the relator's filing date, the FCA still does limit the claims it may add. Under the new provision, the Government's complaint can relate back to the original complaint only "to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint." 31 U.S.C. § 3731(c). The defendants do not argue the scope of the Government's claims concerning Contract 20A impermissibly expands beyond that of Miller's. Accordingly we hold the Government's claims concerning Contract

20A are not barred by the statute of limitations because they relate back to Miller's original timely complaint.

2. Claims Concerning Contracts 07 and 29

In contrast, the Government's claims concerning Contracts 07 and 29 do not meet that standard because they have little to do with Miller's claims concerning Contract 20A. As we noted in *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857 (D.C. Cir. 2008), ordinarily "[t]he underlying question [in analyzing relation back] is whether the original complaint adequately notified the defendants of the basis for liability the plaintiffs would later advance in the amended complaint." *Id.* at 866 (citing 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 1497 ("if the alteration of the original statement is so substantial that it cannot be said that defendant was given adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim . . . then the amendment will not relate back")).

This focus upon notice is in tension with the requirement that a complaint alleging a violation of the FCA be filed under seal and not served "on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). We have not had occasion to address this tension before because in no prior case in this circuit had the Government kept the complaint under seal and refrained from serving it on the defendant until after the statute of limitations had run.[2] The

[2] Although the defendants were aware of the criminal investigation involving the same conduct, they did not have notice until 2001 of the precise allegations in the Government's FCA complaint.

Second Circuit, however, considered this tension when it held the FCA, before it was amended, did not implicitly permit relation back: "The secrecy required by § 3730(b) is incompatible with Rule 15(c)(2) [now 15(c)(1)(B)], because (as is well-settled) the touchstone for relation back pursuant to [that] Rule[] is notice." *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 270 (2006).

Under the statute as amended to allow relation back, the inquiry cannot be whether the defendant had actual notice of the claim before the statute of limitations had run because the FCA specifically requires that the complaint be filed under seal. The timely filed private party's complaint, however, still limits the permissible scope of the Government's later-filed complaint because, as mentioned above, the statute requires that in order to relate back a new claim must arise from the same conduct, transactions, or occurrences as did the timely complaint.

Cases concerning relation back under Rule 15, despite their focus upon notice to the defendant, are useful in analyzing relation back under the FCA because the standards in the FCA and in Rule 15 are substantively identical. As we have seen, the FCA allows relation back only "to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint," 31 U.S.C. § 3731(c); Rule 15(c)(1)(B) allows relation back only to the extent the new pleading "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."

Relation back generally is improper when the new pleading "asserts a new ground for relief supported

by facts that differ in both time and type from those the original pleading set forth," *Mayle v. Felix*, 545 U.S. 644, 650 (2005); "attempts to introduce a new legal theory based on facts different from those underlying the timely claims," *United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002); or, although it "shares 'some elements and some facts in common' with the original claim . . . its effect is 'to fault [the defendants] for conduct different from that identified in the original complaint,'" *Jones v. Bernanke*, 557 F.3d 670, 674 (2009) (quoting *Meijer*, 533 F.3d at 866).

Courts have refused to relate back "amendments alleging the separate publication of a libelous statement, the breach of an independent contract, the infringement of a different patent, or even a separate violation of the same statute." 6A Wright, Miller, & Kane, *supra*, § 1497 (footnotes deleted) (collecting cases). For example, in *United States ex rel. Bledsoe v. Community Health Systems*, 501 F.3d 493 (2007), the Sixth Circuit applied the relation back provisions of Rule 15 in a *qui tam* case involving claims for reimbursement from Medicare and Medicaid submitted under certain Current Procedural Terminology (CPT) codes used for billing medical services. The timely documents alleged improper billing under Code 94799 for services related to "emergency room" and "02 Equip./Daily" but the amended complaint also alleged "improper[] billing . . . under that [same] code for a 'call back' charge for which no procedure is associated"; the court held the latter allegation did not relate back because the former allegation would not have "alert[ed]" the defendant that billing related to call backs was involved. *Id.* at 518–19. The timely documents also made "several allegations of improper billing under CPT code 99201," including allegations

concerning miscoding of supplies, but the amended complaint added allegations of improper billing "for cardiopulmonary resuscitation under [that] code"; again the court held the latter allegations did not relate back because the original documents would not have "alert[ed] [the] [d]efendants . . . that cardiopulmonary resuscitation procedures were involved." *Id.* at 513, 518–19. Although in each instance the allegations in the timely documents and in the amended complaint addressed improper billing under the same billing code, the court held the new allegations did not relate back because they did not "arise from the same conduct, transaction or occurrence" involved in the timely complaint. *Id.* at 519.

In this case, all three contracts are similar only in that each was funded by the USAID and required work related to sewer systems in Egypt. The differences among them, however, are significant. Based upon the allegations in the complaint, the critical facts regarding each contract are the work to be performed, who was prequalified to participate in the bidding that was allegedly rigged, when the contract was awarded, who won the contract, and the amount of the winning bid. The following table summarizes these facts for each contract and thus shows the important differences.

Contract	Awarded	Winning bid	Project	Prequalified	Recipient
20A	1988	$114.9 million	19 km of underground sewer pipe in Cairo	George A. Fuller Co., Fru-Con Construction Co., and Harbert-Jones 20A Joint Venture	Harbert-Jones 20A Joint Venture
29	1989	$114.9 million	Wastewater treatment plant in Cairo	At least Sadelmi U.S.A. and Harbert-Jones 29 Joint Venture	Sadelmi U.S.A.
07	1990	$44.6 million	Sewer in Alexandria	Morrison-Knudsen, FruCon, Maclean Grove, Tidewater, and Harbert-Jones 07 Joint Venture	Harbert-Jones 07 Joint Venture

As reflected in the table, each contract required work to be performed on a different project and was awarded in a different year to a different winning bidder drawn from a different pool of prequalified bidders. Allegations concerning Contract 20A do not fairly encompass Contracts 07 or 29 because each contract is unique and no two involved the same "conduct, transaction[], or occurrence[]."

Miller and the Government argue the use of the plural in Miller's complaint—"conspired to rig the bidding for construction *contracts* paid for by the [USAID]" (emphasis added)—together with the allegation there was a "club [] organized to control prices" and the contention that "discovery in this case will reveal [] other AID contracts," broadened the scope of the complaint beyond Contract 20A. As we held in *Meijer*, however, using the plural form does not cause new allegations to relate back when, as here, the new allegations do not involve "conduct, transactions, or occurrences" common to the timely pleading. *See* 533 F.3d at 866. As in *Meijer*, our decision here is impelled by more than the limited

relevance of the plural form. Miller's allegations concerning any contracts beyond 20A were nothing more than "'naked assertion[s]' devoid of 'further factual enhancement,'" *viz.*, the existence of a price-fixing "club," and that discovery would reveal other rigged contracts. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) (brackets in original). Allowing such broad and vague allegations to expand the range of permissible amendments after the limitation period has run would circumvent the statutory requirement in the FCA that the amendments "arise[] out of the conduct, transactions, or occurrences" in the original complaint, 31 U.S.C. § 3731(c); it would also, we note, circumvent the recent teachings of *Iqbal* and *Twombly* by allowing amendments to relate back to allegations that were themselves nothing more than "naked assertions." That potential for abuse is avoided by the relation back provision in the FCA, the amendment of which postdates *Twombly*, cabining the scope of otherwise untimely amendments by imposing the same "conduct, transactions, or occurrences" requirement. 31 U.S.C. § 3731(c).

Turning to Miller's claims concerning Contracts 07 and 29, we hold they are barred by the statute of limitations because he added them after the limitation period had run. Miller may not take advantage of the relation back provision in the FCA, which applies only to the Government's pleadings. *See id.* If his claims are to relate back then they must do so under Rule 15(c)(1)(B), which permits relation back for claims "that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading." We need not decide whether Rule 15(c)(1)(B) applies to claims made by a relator in litigation under the FCA

because we have determined the claims concerning Contracts 07 and 29 do not meet that standard, which for our purposes is substantially the same as the standard in the amended FCA.

3. Claims Against BIE

Prior to 2006 both Miller's and the Government's complaints named Harbert International Establishment, Inc. (HIE, Inc.) among the defendants; they did not name Bilhar International Establishment (BIE). In amended complaints filed in 2006, Miller and the Government replaced references to "Harbert International Establishment, Inc." with references to "Bilhar International Establishment f/k/a Harbert International Establishment." The statute of limitations bars all claims against BIE unless the amended complaints relate back to a timely complaint. The district court held the amended complaints relate back because BIE should have known it was the intended defendant. *Miller v. Holzmann*, 2007 WL 778599, 2007 U.S. Dist. LEXIS 15598 (D.D.C. Mar. 6, 2007). We agree with the district court.

(a) History of the Companies

A company called Harbert International Establishment was formed in Liechtenstein in 1975. At all relevant times Bill Harbert owned at least part of that company and at various times BHIC and HII owned the remainder. In September 1993 Harbert International Establishment changed its name to Bilhar International Establishment. The next month a new company was formed in Liechtenstein, also called Harbert International Establishment. It acquired many of the assets of BIE (formerly HIE), including both the name Harbert International Establishment and that company's interest in

Contract 20A. After transferring its assets to the new HIE, the old HIE (by then BIE) ceased operating. In 1999 Bill Harbert's son formed Harbert International Establishment, Inc. in Alabama.

(b) Analysis

Rule 15(c)(1)(C), which for present purposes is substantively the same as the version of then-Rule 15(c)(3) applied by the district court, provides an amendment relates back when:

> the amendment changes the party or the naming of the party against whom a claim is asserted . . . if, within the [120 days] provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or *should have known* that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1)(C) (emphasis added).

Relation back under this provision "is most obviously appropriate in cases [such as this] where the plaintiff has sued a corporation but misnamed it." *Roberts v. Michaels*, 219 F.3d 775, 778 (8th Cir. 2000). BIE does not claim the misnaming prejudiced it and the plaintiffs do not dispute BIE's defense that it did not actually know it was the intended defendant; the dispute between the parties is whether BIE should have known it was the intended defendant.

The same attorney represented BIE, HIE, and HIE, Inc. That attorney acknowledges she knew the plaintiffs had erred in naming HIE, Inc., but as between her two other clients with similar names she

"felt that it was likely that the Government had intended to sue Harbert International Establishment[,] . . . not Bilhar International Establishment."

In determining what BIE, in the person of its attorney, knew or should have known, we consider the allegations in Miller's Second Amended Complaint[3] as follows:

Allegation	Comment
(1) BHIC "controls and operates" the defendant.	BHIC owned 79% of BIE but none of HIE.
(2) The defendant is "a Liechtenstein corporation which, upon information and belief, has as its principal place of business Birmingham, Alabama."	This allegation does not advance the inquiry because both HIE and BIE were organized in Liechtenstein and neither has its principal place of business in Alabama.
(3) The defendant "holds a 49 percent share" of HUK.	This allegation applied, at one time or another, to both BIE and HIE. By the time the complaint was filed BIE had sold its 49% interest in HUK to HIE.

[3] The parties agree this is the complaint to which BIE should have referred in order to determine the identity of the intended defendant. BIE states, "Similar allegations appear in the government's Complaint in Intervention," and does not identify any significant differences between the complaints for these purposes.

(4) Bill Harbert was Chairman and Roy Anderson was President of the defendant.	This allegation applied equally to BIE and to HIE.
(5) "In 1991, as a consequence of a reorganization of the Harbert entities, Contract 20A was assigned to Harbert International Establishment, which is owned and controlled by [BHIC], and these companies began participating directly in the conspiracy."	The same paragraph describes HII as managing the 20A Joint Venture, suggesting the referenced assignment of Contract 20A came from HII. The paragraph better describes BIE. As stated above, BHIC owned the majority of BIE, not of HIE. The assignment of Contract 20A did not change in 1991. In 1989 HII assigned it to BIE, which was then known as HIE. In 1993, after the new company was created and named HIE, BIE reassigned Contract 20A to the new HIE.

Of these five allegations, Nos. 2 and 4 are of no help in identifying the correct defendant because they favor neither HIE nor BIE. Of the three allegations that better describe one company than they do the other, only one more accurately applies to HIE: At the time of the complaint, HIE owned 49% of HUK. Allegations 1 and 5 indicate BIE was the intended defendant: BHIC, not HIE, owned the majority of BIE, and HII assigned part of its interest in Contract 20A to the company that, at the time, was named HIE and was owned primarily by BHIC.

Thereafter the assignee participated in the conspiracy. This latter datum, which unlike the others reaches the intended defendant's substantive involvement in the bid rigging, should have led counsel to the conclusion that BIE was the intended defendant.

This discussion undoubtedly seems obscure to anyone unfamiliar with the various companies in the Harbert group of companies. When an attorney for several of these companies, however, receives a complaint she knows mistakenly names as the defendant one company in the group, and she represents two other companies in the group with names similar to that of the named defendant, it should be obvious that she needs to consider the history and corporate structure of both companies and to determine which company is the intended defendant.

BIE argues the Government and Miller could have determined the correct name because the relevant parts of the structure of the Harbert complex were disclosed in certain financial documents of which they had copies. The appropriate inquiry under Rule 15, however, is what the intended defendant "should have known." Fed. R. Civ. P. 15(c)(1)(C)(ii). After this case had been submitted the Supreme Court clarified the issue in *Krupski v. Costa Crociere S.p.A.*, 560 U.S. __, No. 09-337 (June 7, 2010). In *Krupski* the plaintiff sued Costa Cruise Lines N.V. instead of the related company Costa Crociere S.p.A.[4] Although the plaintiff could have determined the correct identity of the intended defendant, the Court explained,

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[4] *Crociera* means cruise in Italian. *See Krupski*, 560 U.S. at __, slip op. at 17.

> Rule 15(c)(1)(C)(ii) asks what the prospective *defendants* knew or should have known during the Rule 4(m) period, not what the *plaintiff* knew or should have known. . . . That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity.

Id. at __, slip op. at 8–9.

BIE argues for the first time in a footnote in its brief on appeal that the 120-day period in Rule 4(m), referred to in Rule 15(c)(1)(C), started to run when the suit was filed in 1995 rather than when the complaint was unsealed in 2001. We do not ordinarily consider an argument made for the first time on appeal. In any event, as we stated in *Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (en banc), "[w]e need not consider cursory arguments made only in a footnote."

4. Remaining Claims

To summarize, the only claims left standing are Miller's claims concerning Contract 20A, as originally pleaded and subsequently amended, and the Government's claims concerning the same contract, which relate back to Miller's claims for purposes of the statute of limitations. All the Government's and Miller's claims concerning Contracts 07 and 29 are time barred.

B. Preemption

BIE, HUK, and BHIC alone argue this case should have been dismissed because the Foreign Assistance Act (FAA), 22 U.S.C. § 2151 *et seq.*, preempts the False Claims Act. The district court rejected this argument in *Miller v. Holzmann*, 2007 WL 710134

at *11, 2007 U.S. Dist. LEXIS 16105 at *35–36 (D.D.C. Mar. 6, 2007). We address the question of preemption *de novo*, *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002), and affirm.

The FAA, which governs how the United States provides aid to foreign countries, includes its own false claim provision. That provision authorizes the President to bring a suit on behalf of the United States, but does not authorize a private party to bring a *qui tam* action. *See* 22 U.S.C. § 2399b(b). In contrast, the FCA allows a private party, in addition to the Attorney General, to bring a civil suit. *See* 31 U.S.C. § 3730(a), (b).

The defendants argue the *qui tam* provision of the FCA conflicts with the lack of such a provision in the FAA because "a precisely drawn, detailed statute preempts more general remedies." *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976). They assert "[a]llowing a *qui tam* relator the right to file an action against foreign aid contractors . . . would effectively nullify the FAA's more restrictive [remedial] provision." With this argument they suggest that, for fraud involving foreign aid, the false claim provision in the FAA, enacted in 1968, implicitly displaced the *qui tam* provision in the FCA, which has been around in some form since 1863. *See* Act of March 2, 1863, ch. 67, § 4, 12 Stat. at 698, Rev. Stat. § 3491.

"[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The FCA and the FAA are surely capable of co-existence. In a case involving foreign aid, such as this one, the Government could bring suit under

either the FCA or the FAA. Indeed, the FCA expressly contemplates the possibility the Government will have a choice of remedy. *See* 31 U.S.C. § 3730(c)(5) ("the Government may elect to pursue its claim through any alternate remedy available to the Government"). A choice does not create a conflict, let alone an "irreconcilable conflict." *See United States v. Batchelder*, 442 U.S. 114, 118, 122 (1979) ("overlapping statutes" with "partial redundancy" "fully capable of coexisting"); *cf. EC Term of Years Trust v. United States*, 550 U.S. 429, 435 (2007) (nine-month limitations period for a claim under specific statute conflicts with four-year period provided by a more general statute).

Finally, the Government need not face the prospect posed by the defendants of a private plaintiff in a *qui tam* case somehow interfering in a case brought by the Government under the FAA. The FCA requires the private plaintiff to present his claim to the Government before it is served on the defendant. The Government may "proceed with the action, . . . dismiss the action notwithstanding the objections of [the relator], . . . settle the action . . . notwithstanding the objections of [the relator]," or keep the complaint under seal during an investigation. 31 U.S.C. §§ 3730(b), (c). Indeed, the FCA specifically authorizes the Government to restrict the relator's involvement, such as by limiting his discovery, if his involvement otherwise "would interfere with the Government's investigation or [with] a prosecution of a criminal or civil matter arising out of the same facts." § 3730(c)(4).

In sum, although the false claims provisions of the FAA and the FCA do overlap, the two statutes are

fully capable of coexisting. Therefore, the FAA does not preempt the FCA.

C. Personal Jurisdiction over HUK

HUK challenges the district court's assertion of personal jurisdiction over it. *Miller v. Holzmann*, 2007 WL 778568, 2007 U.S. Dist. LEXIS 15599 (D.D.C. Mar. 6, 2007); *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 501 F. Supp. 2d 51, 53 & n.3 (D.D.C. 2007). Reviewing the district court's assertion of personal jurisdiction *de novo*, *McAninch v. Wintermute*, 491 F.3d 759, 765 (8th Cir. 2007); *see also FC Inv. Group LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1091 (D.C. Cir. 2008) (reviewing dismissal), we hold HUK had sufficient contacts with the United States to subject the company to the jurisdiction of its courts.

A court may exercise personal jurisdiction over a defendant not present within the forum if the defendant has "certain minimum contacts with [that forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks deleted). The exercise of personal jurisdiction "must have a basis in some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 109 (1987) (internal quotation marks omitted). Personal jurisdiction is proper where the defendant has "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King Corp.*

v. Rudzewicz, 471 U.S. 462, 472 (1985) (internal quotation marks omitted).

HUK argues against personal jurisdiction based upon our decision in *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118 (1999). There we held the Government of "Qatar lacks the minimum contacts with the United States that would make it amenable to suit here" even though it had "entered into a contract with a company based in the United States." *Id.* at 127–28. The contract had been "offered, accepted, and performed in Qatar." *Id.* at 128. In addition, the "contract was made subject to the laws of Qatar, payment was made in Qatari riyals to Creighton's bank account in Qatar, and the alleged breach occurred in Qatar." *Id.* HUK's contacts with the United States were a good deal more substantial than those of Qatar.

At all relevant times HUK was, not surprisingly, based in the United Kingdom. It had no office, bank account, real property, or employees in the United States. It was not a party to Contract 20A, nor was it a member of the joint venture that bid for that contract. On the other hand, HUK was intimately involved with the Harbert-Jones Joint Venture bid for Contract 20A. From 1985 to 1988, fully 50% of HUK's work was on the preparation of the bid for Contract 20A and one of its employees signed the tender. HUK knew that the United States Government was funding the contract and that all payments to HUK for work done in connection with the contract were funded by payments from the United States Government via bank accounts in the United States belonging to one of the other Harbert companies. In addition, the district court found, and HUK does not dispute, the following facts: HUK "was created by

American citizens, acting as agents for . . . American corporations, for the specific purpose of providing services to companies that were bidding on projects that were going to be funded by agencies of the United States." *Miller v. Holzmann*, 2007 WL 39371 at *7–8, 2007 U.S. Dist. LEXIS 501, *25–26 (D.D.C. Jan. 8, 2007).

Considering these facts, we conclude "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (personal jurisdiction over Texas company proper in California court "based on a contract which had substantial connection with" that state). Accordingly, we hold HUK's contacts with the United States were sufficient to give the district court personal jurisdiction over it.

D. Anderson's Settlement

For a time Anderson and the Government tried to settle the Government's case against him. He argues they reached an agreement and have an enforceable settlement; the Government argues the settlement was never made final and should not be enforced.

The district court dismissed "all of the relator's claims on all contracts against defendant Anderson, and all of the Government's claims but one claim on contract 29 against defendant Anderson . . . as untimely under the FCA's statute of limitations." *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 505 F. Supp. 2d 1, 19 (D.D.C. 2007). At trial Anderson was found liable for $149,615.20 on that one claim. 501 F. Supp. 2d 51, 58 (D.D.C. 2007).

Anderson joined the other defendants' argument that the statute of limitations bars all claims concerning Contract 29. Having agreed with the defendants on that point, we have no need to reach Anderson's alternative argument that the Government and he entered into a final and binding settlement agreement.

E. BHIC Stipulation

Prior to trial, the parties jointly stipulated that BHIC "did not exist at the time Contracts 20A, 29, [or] 07 were bid or entered into." This stipulation simplified the more complex, but mostly irrelevant, circumstances surrounding the formation of BHIC. In 1986, an entity named BLH Enterprises, Inc. was formed but had no employees or operations for six years. In December 1991, BLH changed its name to Bill Harbert International Construction, Inc. Then, in 1992, more than a year after Harbert-Jones entered into the last contract, BHIC acquired employees and began operations. At that point, BHIC also became the majority owner of BIE and provided support services such as administrative accounting to that company.

During trial, the Government introduced evidence that the defendants argue contradicted the joint stipulation of fact that BHIC did not exist at the time companies were bidding on and entering into the relevant contracts. The evidence introduced was a document submitted by BHIC in 1992 for prequalification to bid on another contract not at issue in this case. That document included the information about BLH's formation and its subsequent name change, indicating that BHIC had, in fact, existed when Harbert-Jones and other companies bid on and entered into Contracts 20A, 29, and 07. The

Government emphasized this contradiction with the joint stipulation, asking Alf Hill, the project manager for Contract 20A, to read aloud the part of the document explaining BHIC's history. The Government then asked, "So according to this document which was submitted to the Government, BHIC existed since 1986, right?" The project manager replied, "Yes." Over BHIC's objection that the witness had not seen the document before and that the document had not been authenticated, the district court allowed the document to be submitted into evidence and refused to strike the testimony relating to BHIC's date of incorporation. In closing arguments, the Government pointed back to that document, saying "Why are we suing BHIC? . . . Take a look at that document." The Government further clarified its point later in its closing argument, saying, "BHIC was in existence at the time Bill Harbert, Roy Anderson, and Tommy Kitchens were doing what they were doing rigging the bids, dealing with the profits on Contract[s] 20A, 07 and 29."

After trial, BHIC argued in support of a new trial that this evidence was contrary to the stipulation, prejudicial, and undermined the credibility of BHIC counsel, who relied in opening statements on the joint stipulation. The district court denied BHIC's motion for a new trial, and clarified its reasoning for allowing the Government to introduce the evidence that BHIC had incorporated in 1986:

> [P]laintiffs did *not* stipulate that neither BHIC *nor any predecessor company* existed 'at the time Contracts 20A, 29, 07 were bid or entered into.' Plaintiffs did *not* seek to disprove the stipulated fact that BHIC did not exist prior to 1992. Rather, they sought to prove that BHIC, by its

> own admission, is a direct outgrowth of any entity that *did* exist when the bid-rigging occurred.

Miller v. Holzmann, 563 F. Supp. 2d 54, 104 n.61 (D.D.C. 2008).

Even if the stipulation is read so narrowly, the Government violated it. The Government elicited testimony and claimed in closing argument that BHIC *itself* existed since 1986, not that a BHIC predecessor existed since then. Not only that, but the evidence establishes BLH was not in fact a predecessor to BHIC, but actually the same company. The only difference was a change in name. The document introduced by the Government included the articles of incorporation for BLH and the amendment to those articles that change its name to BHIC. The evidence did not seek to prove BHIC was an "outgrowth" of another entity. It established that BHIC existed at the time of the contract bidding.

Stipulations of fact bind the court and parties. *Gander v. Livoti*, 250 F.3d 606, 609 (8th Cir. 2001); *see also Verkouteren v. District of Columbia*, 346 F.2d 842, 844 n.2 (D.C. Cir. 1965). This is their very purpose, their "vital feature." 9 Wigmore, *Evidence* § 2590 (Chadbourn rev. 1981). Once a stipulation of fact is made, "the one party need offer no evidence to prove it and the other is not allowed to disprove it." *Id.* § 2588. When the Government claimed that BHIC existed since 1986, it directly contradicted the joint stipulation that BHIC did not exist until after the bidding for the three contracts.

The contradictory statements constitute substantial prejudice to BHIC. In his opening argument, BHIC's counsel emphasized the stipulated fact, saying, "[I]f you remember those key events, the last

of those was in May 1991, more than a year before BHIC begins its operations in July of 1992. The plaintiffs do not and will not contest that BHIC did not even come into existence, it didn't even exist at the time that Contracts 20A, 29 and 07 were bid and entered into." We agree with BHIC that allowing the Government to contradict the stipulation called into question the credibility of BHIC's counsel, severely impeding counsel's ability to effectively advocate for his client. The district court recognized this problem, but stated that it had "confidence that after hearing testimony concerning the complex corporate restructuring from which most of these defendants emerged, the jury was able to appreciate the distinction between plaintiffs' argument [that BLH ultimately became BHIC] and the stipulated fact." 563 F. Supp. 2d at 104 n.61. But we do not immediately see what distinction separates the Government's assertion that "BHIC existed since 1986," and the stipulated fact that "BHIC did not exist at the time Contracts 20A, 29, 07 were bid or entered into." We therefore cannot conclude that the jury made such a distinction. The district court abused its discretion when it allowed the Government to contradict the stipulation and thereby undermine BHIC's defense. We remand for a new trial for BHIC.

F. Precluding BIE from Contesting Liability

The district court held that BIE was estopped from contesting liability under the FCA as to Contracts 20A and 29 because of its guilty plea in a separate criminal proceeding. *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 2007 WL 851857, 2007 U.S. Dist. LEXIS 17667 (D.D.C. Mar. 14, 2007). In February 2002, BIE pleaded guilty to an indictment charging violations of the Sherman Act, 15

U.S.C. § 1, by its involvement in the bid-rigging conspiracy from 1988 to 1996. BIE contends that it was error to preclude it, based on the doctrine of collateral estoppel, from contesting liability under the FCA because a Sherman Act conspiracy does not require an overt act, while an FCA conspiracy does. Therefore, BIE argues, it might have been able to show that although it was guilty of a Sherman Act violation, it was not liable under the FCA. As BIE sees it, because collateral estoppel affects only issues that were actually litigated and necessarily decided in the first action, *Jack Faucett Assocs. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984), issues relating to the overt acts necessary for the FCA conspiracy were not precluded by the guilty plea in the Sherman Act prosecution, which did not require the proof of such acts. The district court disagreed, reasoning that the overt acts BIE admitted in its guilty plea and accompanying memorandum were essential to its Sherman Act plea because they supplied the factual basis for the plea. *Miller v. Holzmann*, 563 F. Supp. 2d 54, 80–81 (D.D.C. 2008). The district court reasoned that the preclusive effects of a guilty plea in a prior criminal proceeding extend not only to the essential elements of the crime charged, but also to the facts admitted in the accompanying Rule 11 proceeding. As the court explained, Rule 11 "mandates that before entering judgment on a guilty plea, a court must 'mak[e] such inquiry as shall satisfy it that there is a factual basis for the plea.'" *Id.* at 79 (quoting Fed. R. Crim. P. 11(f) (brackets in the district court opinion)). Thus, because the facts admitted in the Rule 11 proceeding are essential to the entry of judgment, it is consistent with the underpinnings of the collateral estoppel doctrine that a defendant should be precluded from

relitigating those facts as well as those related to the essential elements of the crime. Therefore, the court concluded that having admitted liability with respect to Contracts 20A and 29 in the previous proceeding, BIE was properly precluded from contesting its liability for conspiracy with respect to those contracts. *Id.* at 81.

We need not ultimately decide this issue. The district court relied not only on collateral estoppel, but also on the equitable doctrine of judicial estoppel, which states that if a party successfully assumes a certain legal position in one proceeding, "he may not thereafter, simply because his interests have changed, assume a contrary position." *Id.* at 81 n.14 (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). As applied to BIE's circumstances, the court found that BIE was advancing a position contrary to the one the criminal court relied on when it accepted BIE's guilty plea, and that judicial estoppel was therefore appropriate. *Id.*

Before this court, BIE has not asserted any error in this alternative reason for estopping BIE. Because BIE has forfeited the argument that the judicial estoppel was erroneous, we need go no further in our analysis. Even if we were to reject the district court's reasoning on the collateral estoppel theory, we would nonetheless affirm its ruling precluding BIE from contesting liability. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659 (7th Cir. 1998) ("in situations in which there is one or more alternative holdings on an issue, . . . failure to address one of the holdings results in a waiver of any claim of error with respect to the court's decision on that issue").

G. Evidentiary Issues

The defendants argue the district court committed reversible error in four evidentiary rulings: (1) admitting into evidence against all defendants BIE's prior guilty plea; (2) allowing the Government to present expert testimony on the economics of generic cartels; (3) allowing Luigi Ruggieri, an officer of the company that received Contract 29, to testify about his subordinate's meeting with Peter Schmidt, a Holzmann executive in Frankfurt; and (4) permitting the Government to question a witness about the wealth of HII, HC, and a related management company that was not a defendant in this case. We review for abuse of discretion the district court's decisions to admit evidence. *United States v. Watson*, 409 F.3d 458, 462 (D.C. Cir. 2005). However, to the extent the defendants argue the district court misinterpreted the Federal Rules of Evidence, we review those interpretations *de novo*. *United States v. Gewin*, 471 F.3d 197, 200 (D.C. Cir. 2006). Applying those standards, we hold that the district court did not err in the first two decisions. We also hold that Ruggieri's testimony was irrelevant to the remaining Contract 20A claims, and therefore that claim is moot. We do, however, hold that allowing the Government to elicit evidence of HII and HC's wealth constituted an abuse of discretion. Therefore, claims against HII and HC must be remanded for new trial.

1. BIE's Guilty Plea

As explained above, *see supra* at 33, BIE pleaded guilty to violating the Sherman Act, 15 U.S.C. § 1, by engaging in the bid-rigging conspiracy. Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, BIE also submitted a memorandum describing the conspiracy and BIE's role. This guilty plea and

accompanying memorandum explained that BIE and others rigged bids by "submitting bids on USAID-funded Contracts 20A, 29 and 07" and "making payments to co-conspirators who agreed to not compete for USAID-funded contracts 20A and 08 pursuant to the bid-rigging conspiracy." Pl. Ex. 562A, at Joint App'x Pl. Exs. 568–69 (Joint Rule 11 Memorandum, *United States v. Bill Harbert Int'l*, No. 01–00302 (N.D. Ala. Feb. 4, 2002), as redacted).

When the Government sought to introduce evidence of BIE's guilty plea in the district court, the defendants argued that admitting the guilty plea and accompanying Rule 11 memorandum into evidence would improperly impute BIE's involvement to the remaining defendants. The district court disagreed, concluding that the plea and accompanying memorandum were evidence of the factual admissions therein, and were therefore "relevant pieces of evidence that are admissible against all defendants." *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, Civ. No. 95-1231, slip Op. at 4 (D.D.C. Mar. 21, 2007) (Mem. Op. & Order Den. Mot. to Sever). Of course, the plaintiffs would "still bear the burden of establishing a link between the 'others' who BIE allegedly conspired with, and specific defendants in this case." *Id.* at 4 n.3. The court therefore allowed the Government to use the plea in its opening statement and again at the end of its case-in-chief, when counsel read the text of the memorandum to the jury.

The defendants contend that this use of BIE's guilty plea should have been excluded as hearsay. They dispute the plaintiffs' contention that it is admissible under the hearsay exception set forth in Federal Rule of Evidence 803(22). They further

argue that the danger of unfair prejudice substantially outweighed its probative value. *See* Fed. R. Evid. 403. We disagree.

Rule 803(22) permits a judge to admit "[e]vidence of a final judgment, entered after a trial or upon a plea of guilty . . . to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused." First, we note that the exception to Rule 803(22)—the clause beginning "but not including"—does not apply. Because this case is not a criminal prosecution, the rule does not preclude introduction of the plea documents as evidence of the judgment "against persons other than the accused" (*i.e.*, the other defendants) for reasons other than impeachment. That is, because this is a civil case, BIE's guilty plea may be admitted under Rule 803(22) against all the defendants as long as the plea was admitted "to prove any fact essential to sustain the judgment."

The defendants argue the guilty plea was not admitted to establish any *fact*. Instead, they assert, BIE's guilty plea was submitted only as evidence of the *legal conclusion* that BIE was guilty of conspiracy. But the Rule 11 memorandum clearly states more than the bare conclusion that BIE was guilty. Instead, it asserts the several facts already mentioned: that BIE and others submitted bids and made payments as part of a bid-rigging conspiracy involving Contracts 20A, 29, and 07. Each of those facts is essential to sustain the legal conclusion of BIE's guilt under Section 1 of the Sherman Act, and therefore fell within the scope of the rule. Other facts that were not essential to that conclusion—

such as specific references to the defendants—were redacted by the district court. *See United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 2007 WL 842079, 2007 U.S. Dist. LEXIS 18560, at 3 (D.D.C. Mar. 16, 2007). We hold therefore that the district court properly interpreted the scope of Rule 803(22) and properly admitted BIE's guilty plea and Rule 11 memorandum under that rule.

Nor was the admission of BIE's guilty plea improper under Rule 403. Rule 403 states that relevant evidence may be excluded if, *inter alia*, the evidence's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. But to quote the district court, "properly admitted but potentially incriminating evidence does not equate to unfairly prejudicial evidence that must be excluded." *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, Civ. No. 95- 1231, slip Op. at 4–5 (D.D.C. March 21, 2007) (Mem. Op. & Order Den. Mot. to Sever). In assessing prejudice and probativeness, the district court, not this court, "is in the best position to perform this subjective balancing." *United States v. Cassell*, 292 F.3d 788, 795–96 (D.C. Cir. 2002) (quoting *United States v. Washington*, 969 F.2d 1073, 1081 (D.C. Cir. 1992)). We are therefore "extremely wary of second- guessing" the district court, *United States v. Law*, 528 F.3d 888, 898 (D.C. Cir. 2008) (quoting *Henderson v. George Wash. Univ.*, 449 F.3d 127, 133 (D.C. Cir. 2006)), and review its decision "only for 'grave abuse,'" *Cassell*, 292 F.3d at 796 (quoting *Washington*, 969 F.2d at 1081).

BIE's guilty plea did carry with it the potential to cause prejudice or confuse the jury—it might have presumed that the "co-conspirators" referred to in the

plea were the other defendants in the case. The district court recognized that potential, acknowledging that the "documents pose certain problems insofar as they refer to other parties who are defendants here," *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 2007 WL 842079, 2007 U.S. Dist. LEXIS 18560, at 3 (D.D.C. March 16, 2007), and that a jury might assume the other parties were also guilty under BIE's plea just because the case caption listed them. Therefore, the court struck any names other than BIE's in the case caption and elsewhere on the document. *See id.* With that redaction, the court held that "the recitation of facts admitted to by BIE is highly probative, and, under these conditions [of redaction], poses relatively little risk of undue prejudice." *Id.* at 3–4. The court further mitigated the potential problem by twice instructing the jury that "[t]he fact that BIE pleaded guilty may not in any respect be considered against any other defendants, nor may any inference be drawn against them by reason of BIE's plea of guilty." Given these protective measures against undue prejudice, the district court clearly did not abuse its discretion in admitting against all defendants the evidence of BIE's guilty plea.

HII separately argues the guilty plea was particularly prejudicial to it because the Government implied in its opening statement that HII was trying to avoid responsibility. According to HII, this implication would look particularly reprehensible when juxtaposed with BIE's guilty plea. The jury, HII asserts, might have seen the guilty plea as evidence of BIE "taking responsibility" while HII avoided doing the same. Again, we disagree. HII's argument rests on a short passage from the Government's opening statement, in which counsel argued that

"just because [HII] assigned [the contracts] out to Harbert International Establishment, they don't assign away their responsibilities." As the plaintiffs argue, that brief comment did not suggest that HII had been implicated in the earlier criminal case against BIE, but instead noted only "that HII did not escape liability *for its own actions* when it assigned Contracts 20A and 07 to BIE." Thus, the Government's comment does not disturb our holding that the district court did not abuse its discretion in admitting against all defendants the evidence of BIE's guilty plea.

2. Expert Testimony on Cartels

Preston McAfee, a professor of economics and business strategy at California Institute of Technology, testified for the Government as an expert witness on how bid-rigging cartels work. McAfee had no direct knowledge of the facts in this case, and testified that he had not examined the evidence to conclude whether there actually was any bid rigging in this case. Instead, he testified about "how auction and bidding work, how collusion in auctions work[s], and the incentives that are created for seeking cost-reducing technologies." For example, he explained that an economically rational member of a cartel must factor into its calculation of costs the risks associated with bid rigging (*i.e.*, being found out and prosecuted). The cartel member's bid must be higher than that of a competitive bidder in order to cover those costs. McAfee also explained what could be inferred from the assumption that a cartel existed. For example, he testified that if a cartel existed, one could infer that members of the cartel must be able to successfully influence the bidding process if they are to succeed in the object of the

conspiracy—that is, rigging the bids. But the individual who prepares the bid need not know about the cartel, as long as that person is "influenced by somebody who knows about the cartel." In sum, the professor explained that "[c]artels are formed . . . to subvert competition and increase prices" and testified how a cartel member achieves that purpose.

Rule 702 of the Federal Rules of Evidence provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. However, not all scientific testimony is created equal; some expert opinions are more helpful or more valid than others. Recognizing this fact, in 1993, the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), held that trial judges must act as gatekeepers to exclude unreliable expert testimony. Under *Daubert* and the Court's further clarification in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), testimony admitted under Rule 702 must be both reliable and relevant. *Id.* at 152. In 2000, the Supreme Court amended Rule 702 to reflect the *Daubert* line of cases, outlining general standards that the trial court must use to assess the reliability and relevance of testimony. An expert witness may therefore testify only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.

The defendants moved *in limine* to exclude McAfee's testimony, arguing the testimony did not meet the standards of Rule 702 because it was too broad, too generic, and based too heavily on assumptions rather than analysis of the actual evidence. They argued that McAfee's testimony was not related to the facts of the case. Instead, McAfee simply assumed that a cartel actually existed between the defendants and other companies in order to make his testimony relevant. The defendants also stressed that McAfee had not tried to determine whether a cartel existed in this case, even though there are economics-based strategies to identify whether bids are in fact collusive. Because of these weaknesses, McAfee's testimony would not assist the jury in understanding the evidence as required by Rule 702.

The district court denied the motions, and reaffirmed and explained its decision when it denied motions for a new trial. In its opinion denying a new trial, the court explicitly held that McAfee's testimony satisfied the requirements of *Daubert* and Rule 702. *Miller v. Holzmann*, 563 F. Supp. 2d 54, 96 (D.D.C. 2008). Quoting the advisory committee's note to Rule 702, the court stated that in some cases an expert may give valuable testimony to the factfinder by explaining general principles "without ever attempting to apply these principles to the specific facts of the case." *Id.* at 90 (quoting Fed. R. Evid. 702 advisory committee's note) (emphasis omitted). According to the advisory committee's note, "[f]or this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony 'fit' the facts of the case." Fed. R. Evid. 702 advisory committee's

note. The district court initially held that McAfee was a qualified expert. 563 F. Supp. 2d at 92 & n.40; *see also id.* at 96 (listing McAfee's credentials as evidence that he was "well-qualified to testify on generally-accepted economics principles"). The court then proceeded to analyze McAfee's testimony under the rest of the advisory committee's note's rubric, first assessing relevance (addressed by the second and fourth criteria), then reliability (addressed by the third).

First, the district court held McAfee's testimony to be relevant. The testimony addressed a subject matter appropriate for expert testimony—the second criterion under the Rule 702 advisory committee's note—because McAfee explained complex processes and economic theory such as the federal government's procurement process, auction incentives, and the effect of collusion on auctions. *Id.* at 92. These topics "are precisely the sort of specialized, technical matter concerning which a lay jury may benefit from a qualified expert's tutelage." *Id.* The testimony also "'fit' the facts of the case" as required by the fourth criterion. The defendants argued that the assumptions on which McAfee based his testimony were not based in the facts of the case, and therefore did not "fit." But the district court disagreed. The court pointed out that, contrary to the defendants' assertions, "McAfee *never* assumed that a cartel existed *in this case*." *Id.* at 94. Instead, McAfee made it clear he was describing generic circumstances, "leaving the jury to determine which scenario best 'fit' the facts in this case." *Id.*; *see also id.* at 94 n.45 (holding that McAfee's testimony also did not create unfair prejudice under Rule 403 because he "repeatedly" explained he was not familiar with the facts, and that he did not know whether collusion occurred

here). His testimony, while not derived from the facts in the case, was sufficiently connected to the facts to be relevant and helpful to the jury. *Id.* at 95.

Last, the district court turned to the third criterion—reliability—noting that "the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Id.* at 95 (quoting *Kumho*, 526 U.S. at 141-42). Citing *Daubert*'s observations about how to determine whether expert testimony is reliable—from whether a theory has been subjected to peer review, to its potential rate of error, to whether a theory is generally accepted in the relevant field—the court determined that McAfee's testimony was reliable. *Id.* at 96. McAfee has published over twenty peer-reviewed articles on his theories about the nature of auctions and bidding. His testimony on economics "embodied basic principles" that are "taught in undergraduate economics courses" and "generally accepted in the field of economics." *Id.* Therefore, concluded the district court, McAfee's testimony satisfied the reliability criterion.

As the preceding summary of the court's reasoning demonstrates, the district court thoroughly and thoughtfully analyzed the application of Rule 702 to McAfee's testimony. We also note that district courts have "broad discretion in determining whether to admit or exclude expert testimony." *United States v. Gatling*, 96 F.3d 1511, 1523 (D.C. Cir. 1996). The court clearly did not abuse that discretion.

The defendants also argue that McAfee's testimony should have been excluded under Rule 403 because the professor used "highly charged terms" such as "cartel member" and "colluders," and even once made

an analogy to bank robbers. As *Daubert* explained, Rule 403 exclusion based on unfair prejudice is particularly important in the case of expert evidence, which "can be both powerful and quite misleading because of the difficulty in evaluating it." 509 U.S. at 595 (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)). But, as explained above, *see supra* at 38, the district court is best able to apply the balancing test of Rule 403 and determine whether evidence's potential for undue prejudice substantially outweighs its probative value. This is true for expert testimony as well as for other types of evidence. Mindful, therefore, of our responsibility not to second-guess the district court's application of the Rule 403 balancing test, we conclude the district court did not improperly apply the rule here. McAfee used terms descriptive of the theories he explained, but he also repeatedly emphasized that he was not applying the terms to the facts in this case or these defendants. The district court did not abuse its discretion when it determined that McAfee's use of terms like "cartel members" and "colluders" did not make his testimony's potential for undue prejudice substantially outweigh its probative value. Indeed, it is difficult to conceive of expert testimony relevant to the issues of this case in which the witness would not employ terms like "cartel members" and "colluders." We note that Rule 403 provides the exclusion of evidence if its "probative value is substantially outweighed by the danger of *unfair* prejudice," not simply "prejudice." In some sense, any evidence that is probative might be arguably prejudicial. That is, the purpose of offering evidence is to influence the decision of the jury. We can hardly say that the district court abused its discretion by admitting

expert testimony that used terms entirely relevant to the issues at trial.

3. Ruggieri's Testimony

Luigi Ruggieri was an officer of Asea Brown Boveri Ltd., the parent company of Sadelmi U.S.A., Inc. (SUSA), the company that received Contract 29. Over the objection of the defendants, the district court allowed Ruggieri to testify about a conversation he had with his subordinate, Giovanni Greselin, about a meeting between Greselin and Peter Schmidt, the Holzmann executive who hosted the conspiracy meetings in Frankfurt. In his testimony, Ruggieri stated that Schmidt met with Greselin and a "gentleman from Harbert" in Frankfurt. There, Schmidt proposed to Greselin that they agree on which of their companies would bid lower for Contract 29, with compensation going to the losing bidder. Ruggieri also testified, without objection from the defendants, to his personal involvement in the conspiracy. He said that he saw, then shredded, a document signed by Greselin outlining the bid rigging between Harbert-Jones and SUSA. Ruggieri then authorized Greselin to go ahead with the agreement and pay Harbert-Jones a loser's fee in cash.

Ruggieri's testimony dealt only with the bid rigging of Contract 29. We have already dismissed all the claims against the defendants regarding Contract 29 for violation of the statute of limitations. *See supra* at 24–25. The defendants do not argue that the part of Ruggieri's testimony to which they object—his testimony about the conversation between Greselin and Schmidt—tainted the jury's consideration of the remaining claims under Contract 20A or provided the only link between any

one of the defendants and the conspiracy involving 20A. Therefore the defendants' arguments regarding the admissibility of Ruggieri's testimony under Fed. R. Evid. 801(d)(2)(E) are moot. We need not address them here.

4. Evidence of HII and HC's Wealth

Raymond Harbert is Bill Harbert's nephew and CEO of Harbert Management Company, a company formed in 1993 (after most of the underlying events in this case) that manages assets for third parties, including HC. When Raymond Harbert testified, Miller's counsel asked him about the assets of HII, HC, and Harbert Management Company. From the exchange, counsel elicited that HII currently owns or is associated with seven or eight power plants in California, owns various cash assets, and makes approximately $40 to $50 million in annual revenues. Raymond Harbert also confirmed that between approximately 1990 and 1993, HII sold somewhere between $250 million and $500 million in assets, including selling its 50% ownership in BIE. Raymond Harbert also testified that HC was a holding company with assets in the form of stock in subsidiary companies, and that Harbert Management Company currently manages over $100 million in assets for HC. He also testified that Harbert Management Company manages assets for other Harbert entities, including individuals of the Harbert family, for a total of around $9 billion in assets. In its closing, the Government recalled this testimony and juxtaposed the wealth of all the Harbert companies with the relative poverty of those in countries benefitting from projects funded by the USAID, saying that the excess money the Govern-

ment paid to the conspirators "could have [been] used for less fortunate people in other countries."

Counsel for HII and HC objected to this testimony on the grounds that information about the companies' wealth was both irrelevant and prejudicial, and reiterate this argument on appeal. We agree. To be admitted, evidence must be relevant. Fed. R. Evid. 402. That is, the evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. None of Raymond Harbert's testimony described above satisfies this definition. No fact concerning the present size and scope of Harbert Management Company was of consequence to the determination of the action. The present size and scope of Harbert Management Company, a company that was not a defendant and manages assets for many non-defendants, including Raymond Harbert, his mother, and other members of the Harbert family, had nothing to do with the liability of any of the defendants or the measure of damages. Indeed, the district court recognized this irrelevance in its opinion denying a new trial, though it deemed the irrelevant evidence not prejudicial. 563 F. Supp. 2d at 111 n.73. However, arguments to the jury about a defendant's wealth are grounds for new trial. *Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970) ("Remarks . . . which can be taken as suggesting that the defendant should respond in damages because he is rich and the plaintiff is poor, are grounds for a new trial.") (citing *Washington Annapolis Hotel Co. v. Riddle*, 171 F.2d 732, 740 (D.C. Cir. 1948) ("A mistrial should have been declared on account of these remarks [suggesting that the defendant should

respond in damages because it was rich and the plaintiff poor].")).

Nor was evidence of the wealth of HII and of HC relevant. The district court said the testimony concerning HII and HC was properly admitted because it could help the jury decide whether one company was the alter ego of the other, a theory presented by the Government as a way to implicate HC in the conspiracy. 563 F. Supp. 2d at 111. "Under the alter ego theory, the court may ignore the existence of the corporate form whenever an individual so dominates an organization 'as in reality to negate its separate personality.'" *Founding Church of Scientology of Wash., D.C., Inc. v. Webster*, 802 F.2d 1448, 1452 (D.C. Cir. 1986) (quoting *Quinn v. Butz*, 510 F.2d 743, 758 (D.C. Cir. 1975)). Applied to this case, HII would be the alter ego of HC: if the jury had decided HII was part of the conspiracy, and that it was the alter ego of HC, the jury could have found HC liable for the conspiracy even if there was no direct evidence that HC had itself joined the conspiracy. But the evidence described above does not help establish whether HII was the alter ego of HC. Instead, Raymond Harbert testified only as to how much money HII made from selling assets in the 1990s, how much money HII makes now, and how many assets HC now has. Under Rule 401's terms, the evidence made it no "more probable or less probable" that one corporation was the alter ego of the other. The only way the information could have affected the jury was to prejudice it.

The Government and Miller argue before us that all the testimony at issue was nonetheless admissible because the counsel for HII and HC brought up the subject of its wealth first, and in any case "the

amount of wealth evidence elicited and referred to at trial was not large and was not significant enough" to warrant a new trial. We disagree on both points. First, the plaintiffs cite only two references to support their "But they started it!" argument: counsel's opening and closing statements.[5] Neither reference is convincing. The first time HII and HC's counsel referenced the corporations' money was to point out Miller's monetary interest in the case. This is a perfectly acceptable point for counsel to make. *Cf. United States v. Smith*, 232 F.3d 236, 242 (D.C. Cir. 2000) ("Routinely, defense counsel cross-examines government witness about an informant's bias—whether it be a plea agreement, a financial arrangement, or both."); 3 *Federal Jury Practice and Instructions* § 101.43 (5th ed.) (jury instruction stating that, in assessing the credibility of a witness, jury may consider whether the witness has any bias or prejudice). It is unrelated to the testimony later elicited by the plaintiffs about the various Harbert companies' wealth. Even less convincing is the plaintiffs' reliance on counsel's closing statements, which

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[5] In a footnote, the plaintiffs also cite two other statements to support their assertion that HII and HC brought up their wealth "throughout trial." The first reference only obliquely touches on those companies' wealth when counsel asked Miller about wealthy corporations in general. Nothing was said about HII or HC in particular. The second reference is even less pertinent. There, counsel asked a witness if she thought John Harbert, Bill Harbert's nephew who was also involved in the Harbert companies, ever "felt that he needed to investigate or look over the shoulder of Mr. Bill Harbert." In response, the witness testified the two might have been a little suspicious of each other and recalled that John Harbert spent a lot of money on his hunting dogs. Whatever insight that testimony gave into the relationship between those two men, it had nothing to do with HII and HC's wealth.

of course came *after* the plaintiffs had already elicited Raymond Harbert's testimony.

As for the argument that there was not enough prejudice to warrant a new trial, again we disagree. Evidence need not be reinforced and reiterated again and again for it to be prejudicial enough to warrant a new trial. Here, it is enough that there were several inappropriate references to multiple different companies' wealth, especially given that the Government's counsel emphasized the wealth of the Harbert companies in his closing statement and insinuated that the money would be in better hands if it were taken from the defendants. We therefore vacate the judgments with respect to HII and HC and remand for a new trial for those two defendants.

H. Sufficiency of the Evidence

Finally, the defendants argue that the evidence was insufficient to support the jury verdict. Given our resolution of the foregoing issues, however, we need address only the arguments made by HUK and BIE. *See* Part II.D (claims against Anderson, which were limited to Contract 29, are time-barred); Part II.E (Government's contradiction of stipulation regarding BHIC requires new trial); Part II.G.4 (evidence of HII and HC's wealth requires new trial).

The jury found HUK liable for conspiracy, as well as for substantive FCA violations with respect to Contract 20A. To hold HUK liable for conspiracy, the jury must have found (1) that an agreement existed to have false or fraudulent claims allowed or paid by the United States; (2) that HUK willfully joined that agreement, either at the conspiracy's inception or afterwards; and (3) that one or more conspirators knowingly committed one or more overt acts in

furtherance of the object of the conspiracy. *See Miller v. Holzmann*, 563 F. Supp. 2d 54, 114 n.83 (D.D.C. 2008); *see also, e.g.*, *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) (describing the elements of common law civil conspiracy). HUK challenges all three findings. Although estopped from challenging its liability, *see* Part II.F, BIE joins HUK in contending that the jury erred in its calculation of damages.

The district court denied the defendants' motion for judgment as a matter of law with respect to the sufficiency of the evidence. Although we review that decision *de novo*, we "do not . . . lightly disturb a jury verdict." *McGill v. Muñoz*, 203 F.3d 843, 845 (D.C. Cir. 2000). We "draw all reasonable inferences in favor of the nonmoving party and . . . may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). We "disregard all evidence favorable to the moving party [here, the defendants] that the jury is not required to believe," *id.* at 151, and will reverse a jury's decision "only if the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not have reached a verdict in plaintiff[s'] favor." *McGill*, 204 F.3d at 845 (internal quotation marks omitted).

1. Overarching Conspiracy

The plaintiffs alleged and the jury found an overarching conspiracy spanning Contracts 20A, 29, and 07. HUK contends that the evidence does not support this finding and that we must therefore reverse both the conspiracy and substantive verdicts against it. We must reverse the conspiracy verdict, HUK urges, because record evidence shows only that

Peter Schmidt "was involved in three separate and distinct episodes of discussing bid-rigging." Citing *Kotteakos v. United States*, 328 U.S. 750, 774 (1946), the defendants also argue that we must reverse the substantive verdict because the overarching conspiracy theory created "dangers of transference of guilt from one [defendant] to another." In other words, HUK argues, the jury may well have relied on its conspiracy verdict to hold HUK liable for substantive FCA violations based on the actions of its co-conspirators. *See Halberstam*, 705 F.2d at 481.

As we explained in *United States v. Tarantino*, 846 F.2d 1384, 1393 (D.C. Cir. 1988), a jury must consider three factors to determine whether potentially connected conduct constitutes an overarching conspiracy: (1) "whether the conspirators share[d] a common goal"; (2) "the degree of dependence inherent in the conspiracy"; and (3) "the overlap of participants" between the arguably separate schemes. Pointing out that *Tarantino* involved a drug conspiracy, HUK argues that this framework is inapplicable, or at least more demanding, where, as here, the conspiracy is of a commercial nature. But we have repeatedly applied this three-part inquiry to non-drug conspiracies without altering its contours. *See, e.g.*, *United States v. Hemphill*, 514 F.3d 1350, 1363–64 (D.C. Cir. 2008) (single conspiracy to steal from Washington Teachers Union); *United States v. Gatling*, 96 F.3d 1511, 1520 (D.C. Cir. 1996) (single conspiracy to commit bribery in connection with illegal issuance of section 8 housing subsidies); *cf. United States v. Anderson*, 326 F.3d 1319, 1327–28 (11th Cir. 2003) (applying this three-part framework and upholding a jury finding of an overarching conspiracy in Anderson's criminal case on the same facts as in the case before us). To apply that test to

the overarching conspiracy the jury found in this case, we must consider testimony and evidence regarding the bidding on each contract even though, as explained in Part II.A.2, Contracts 29 and 07, by themselves, cannot give rise to substantive liability against any defendant. *Cf. Hemphill*, 514 F.3d at 1363–64 (considering evidence relating to multiple schemes as proof of one overarching conspiracy).

In assessing the first factor—whether defendants involved in allegedly conspiratorial conduct shared a common goal—"a conspiracy's purpose should not be defined in too narrow or specific terms." *Gatling*, 96 F.3d at 1520. Thus, we have found "obtaining money in exchange for [government] subsidies," *id.*, and "steal[ing] money from [a] union," *Hemphill*, 514 F.3d at 1364, to be sufficiently specific common purposes. Reviewing the evidence, the district court determined that the jury could have reasonably found an overarching conspiracy with a common purpose of "limiting competition" in bidding on projects in Egypt funded by the USAID. *Miller*, 563 F. Supp. 2d at 138–139 & n.131. We agree.

The jury heard testimony revealing just such a common purpose, including for example Anderson's statement that all prequalified contractors working in Egypt were part of a "Frankfurt Club" that "set up" the bids on Egyptian contracts. John Ollis, Vice President of Holzmann, inferred from Anderson's comments that "the jobs that we were bidding, there had been some kind of arrangements made among the bidders to collaborate on how much would be bid. In the vernacular, bid-rigging." The defendants contend that even if the other participants shared the common goal of limiting competition in Egypt, "Schmidt had a separate goal—pursing Holzmann's

interests *in Europe*." In support, they point to testimony that Schmidt offered to make a trade with SUSA, a prequalified bidder on Contract 29, under which SUSA would win that contract in exchange for Harbert-Jones winning a later contract in Europe. During the second Contract 29 meeting, however, Schmidt abandoned this plan, and in any event, Schmidt's fleeting desire to use the conspiracy to accomplish an additional goal is insufficient to undermine the jury's finding of a common purpose across all three contracts.

The second factor, interdependence, requires that each defendant's actions "facilitate the endeavors of other alleged coconspirators or facilitate the venture as a whole." *United States v. Carnagie*, 533 F.3d 1231, 1238 (10th Cir. 2008) (internal quotation marks omitted); *see also Tarantino*, 846 F.2d at 1392–93. We have upheld a jury's finding of interdependence where "the assistance one branch of a conspiracy provides to another is fairly minimal" and where "given the overlap in participation and timing . . . accusations relating to one of the schemes could trigger an investigation that would lead to exposure" of the others. *Gatling*, 96 F.3d at 1522. This standard is clearly satisfied here. For one thing, a written bid-rigging agreement between Holzmann and Archirodon (Fuller's parent company) regarding Contract 20A expressly contemplated future collusion on Contract 29. Similarly, a SUSA manager testified that Schmidt offered SUSA a deal in which "the loser" on Contract 29 would bid high on that contract and "the winner" would compensate "the loser" "in kind," by bidding high on another "contract[] to be bid in Egypt similar to [Contract 29]." The jury could also have reasonably inferred interdependence from financial statements for the "Harbert-Jones Egypt

Joint Venture," which included Contract 20A, Contract 07, and other projects.

The third factor—overlap among participants—is "less significant" than the others, requiring "only that the main conspirators work with all the participants." *Hemphill*, 514 F.3d at 1363 (citing *United States v. Mathis*, 216 F.3d 18, 23– 24 (D.C. Cir. 2000)). Again, record evidence satisfies this standard. The defendants concede that Schmidt, on behalf of Jones and its parent company, Holzmann, was involved in all three contracts. The jury also heard evidence (1) that another prequalified bidder, Fru-Con (through its parent company, Bilfinger & Berger), received payoffs for cooperating on Contracts 20A and 07; (2) that BIE admitted conspiring to rig bids on Contracts 20A and 29; and (3) that Anderson participated in meetings on Contracts 20A and 07, may well have participated in a meeting on Contract 29, and had authority over all three contracts. Thus, the jury could have reasonably concluded that Schmidt and possibly Anderson worked with all participants and that BIE and HII (through Anderson) were directly involved in rigging bids on multiple contracts. The defendants respond that with the exception of Schmidt and Anderson, each individual met with competitors to discuss but one contract. True enough, but because the conspiracy was between *corporations*, the identity of the *individuals* representing those corporations at bid-rigging meetings is irrelevant. In sum, then, sufficient evidence supports the jury's finding of an overarching conspiracy.

2. HUK's Involvement in the Conspiracy

Even if a reasonable jury could have found an overarching conspiracy, HUK insists that the

evidence is insufficient to show that it willfully joined that conspiracy. In evaluating this argument, we note that "in most civil conspiracy cases," the jury "ha[s] to infer an agreement from indirect evidence." *Halberstam*, 705 F.2d at 486. A jury may infer that a defendant willfully joined the conspiracy if he understood the scheme's "essential nature and general scope." *Hobson v. Wilson*, 737 F.2d 1, 52 (D.C. Cir. 1984) (internal quotation marks omitted), *overruled in part on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). Under basic principles of agency law, corporate defendants are charged with constructive knowledge of all material facts that their agents and officers learn in the scope of their employment. *See* 2 William Fletcher, *Cyclopedia of the Law of Corporations* § 790 (2010); *see also BCCI Holdings (Luxembourg), S.A. v. Clifford*, 964 F. Supp. 468, 478 (D.D.C. 1997). Thus, to uphold the jury's finding that HUK joined the conspiracy, we must be sure that the record contains sufficient evidence for the jury to have reasonably found that (1) an HUK employee, officer, or director knowingly joined the conspiracy and (2) in so doing, acted within the scope of his HUK duties.

At trial, the plaintiffs presented testimony and evidence that revealed HUK's involvement in bidding on Contract 20A. In April 1988, the USAID and an Egyptian government agency called the Cairo Wastewater Organization solicited bids on Contract 20A from three prequalified contractors: George A. Fuller Co. (Fuller); Fru-Con Construction Company; and the Harbert-Jones 20A Joint Venture.

A month later, Schmidt invited a group of prequalified contractors to meet in Frankfurt. Schmidt

suggested that the others bid high on Contract 20A in exchange for a payoff. Although no agreement was reached at that meeting, several weeks later Schmidt and an executive of Bilfinger & Berger (B&B) (Fru-Con's parent company) agreed that Fru-Con would submit a high bid in exchange for a payoff equivalent to 2–3% of the contract value.

The Harbert-Jones joint venture convened a bid reconciliation meeting in June. Jones's estimator, Carl Nagel, proposed that Harbert-Jones bid $95.2 million. Ian Young, HUK's lead estimator, represented Harbert at the meeting, where the Harbert team suggested to the Jones team that they include more conservative estimates. Based in part on these suggestions, the two sides initially agreed to bid $103 million. After Anderson arrived at the meeting and once additional "philosophy changes," including more expensive methods of construction, were incorporated into the bid, the joint proposal increased to $130 million. Shortly thereafter, Harbert-Jones submitted a $125 million bid, which Young signed.

On August 3, the final day to submit bids, Schmidt and an officer of Fuller's parent, Archirodon, signed a written agreement stipulating that Fuller would refrain from bidding on Contract 20A in exchange for Archirodon receiving either 5% of the contract value or 3% and a subcontract. In addition, Holzmann committed to "caus[ing]" Harbert-Jones to "reciprocate" by helping Fuller obtain another contract of similar value from the USAID, such as Contract 29. On the same day, Young directed that the Harbert-Jones bid be increased by 3.5%, to $129 million.

The bids were opened the next day. Fru-Con had bid $152 million, Harbert-Jones had bid $129 million, and Fuller had not bid at all. Although the lower of the bids, Harbert-Jones's was substantially higher than the project's consultant had expected. As a result, the Cairo Wastewater Organization and the USAID opted to scale down the contract and solicit re-bids.

In December, Anderson, Schmidt, and Archirodon representatives met to discuss the new round of bidding. In a handwritten addendum to the August agreement, they agreed that Fuller would receive a subcontract worth at least $2.5 million plus $500,000 cash. Later that month, Fru-Con bid $139 million for the scaled-down version of Contract 20A, and Harbert-Jones bid $115 million. Harbert-Jones won the contract, eventually submitting 33 invoices totaling over $107 million.

In January 1990, Schmidt, Anderson, and a representative from Archirodon negotiated a payment schedule for the agreed-upon $3 million payoff. Holzmann made payments to Archirodon over the next year. Testimony and other evidence suggest that Harbert-Jones funneled money for these payoffs through HUK. For example, Holzmann billed HUK for services it never requested nor received, and HUK paid those invoices.

According to HUK, this evidence is insufficient to support the jury's finding that the company agreed to join the overarching conspiracy. We disagree. The jury could have reasonably concluded that Ian Young, HUK's lead estimator, knowingly joined the conspiracy on behalf of HUK. Specifically, Young's interactions with Roy Anderson, his behavior at the Harbert-Jones bid-reconciliation meeting, and his

involvement in increasing the bid on the same day that Schmidt secured Archirodon's no-bid promise all suggest he knowingly joined the conspiracy while acting within the scope of his employment for HUK.

The jury had reason to believe that Anderson knew of the conspiracy by the time of the June 1988 bid-reconciliation meeting. Specifically, it heard testimony and viewed evidence that Anderson was the Vice President of HII, the 60% partner in the joint venture; that he was the "lead man" on the Egypt jobs; that he held powers of attorney from the President of HII, Bill Harbert, authorizing him "without reservation" to represent HII in the bidding; and that he may have been present at the May 1988 meeting in which Schmidt proposed the bid-rigging scheme, *see Miller*, 563 F. Supp. 2d at 116 n.87 ("In light of Anderson's explicit status as HII's point-man in Europe for international contracting and his attendance at the December 1988 renegotiation with Fuller, it would be reasonable to infer that if a HII representative attended the May meeting, it would have been Anderson."). The jury also heard evidence suggesting that Anderson could have passed his knowledge along to Young: Colin Towsey, the Managing Director of HUK, testified that Anderson and Young "had interactions . . . with respect to the bidding on Contract 20A," and "had discussions about what the estimating work would be."

In addition, the jury could have reasonably inferred that Young knew of the conspiracy based on evidence that he sought to increase the bid at the Harbert-Jones bid reconciliation meeting. Nagel, Jones's estimator, testified that although Jones's pre-meeting proposal was $95.2 million, Young's "arm twist[ing]" "pressured" the Jones team to include

more expensive methods of construction, thus significantly increasing the bid, first to $103 million and later, after Anderson's arrival, to $130 million. Nagel testified that he thought that even the $103 million figure was "inflated." According to Nagel, the Jones team deferred to Young because Harbert was the majority owner of the joint venture, giving Harbert "the hammer" in the negotiations. Similarly, Young's August 3 order to increase the bid by 3.5%—the same day Schmidt secured a no-bid agreement from Archirodon—could also lead a reasonable jury to conclude that he knew about the bid rigging. Reinforcing these inferences, the plaintiffs' expert explained that in order to make collusive agreements profitable, managers must exert influence on the prices their companies set.

HUK challenges this view of the evidence, arguing that an innocent explanation supports Young's actions and that "[c]onduct that is as consistent with other equally plausible explanations as with illegal conspiracy, without more, does not support an inference of conspiracy." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). According to HUK, at the bid-reconciliation meeting Young simply believed that more conservative construction techniques should be used. This explanation is bolstered, HUK tells us, by Nagel's statement on cross-examination that reasonable and experienced estimators could disagree about the need for such methods. Similarly, HUK contends that Young's August 3 order to increase the bid by 3.5% was completely innocent—the letter was one of two prepared in advance to deal with volatile steel prices. As the district court observed, however, these arguments largely ignore the standard of review for

sufficiency challenges: "In essence, HUK merely posits that another—in its opinion, better—explanation of the facts exists. But at this stage in the litigation, the relevant question is whether the view adopted by the jury in reaching its verdict was at all *reasonable*." *Miller*, 563 F. Supp. 2d at 121 n.98 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)). Here the jury had sufficient evidence to conclude that Young's efforts to increase the bid were motivated by knowledge of a bid-rigging conspiracy. Moreover, in crediting the plaintiffs' version of the facts over HUK's more innocent explanation, the jury would have had no need to speculate, as HUK claims it did. Testimony regarding Young's interactions with Anderson, the existence of a bid-rigging agreement between Harbert-Jones and Fru-Con, the timing of Young's actions, and the expert testimony about collusive agreements all support the jury's inference that Young knowingly joined the conspiracy. *Cf. Matsushita*, 475 U.S. at 596–97 (where plaintiffs fail to show that defendants had *any* plausible motive to engage in conspiracy, conduct consistent with other, equally plausible explanations does not give rise to an inference of conspiracy).

Sufficient evidence also supports the jury's finding that Young acquired knowledge of the conspiracy while acting within the scope of his employment for HUK. Not only was Young an HUK employee when Contract 20A was bid, but in his testimony, Colin Towsey, HUK's Managing Director, revealed that Young worked on the bid as part of his HUK employment. HUK counters that Towsey's testimony suggests that during the relevant period Young was actually working for BIE, HUK's 49% owner. But Towsey's testimony establishes only that HUK "provide[d] some engineering and estimating support"

to BIE. Towsey never said that Young worked primarily or exclusively for BIE; in fact, Towsey indicated that Young worked in HUK's London office during this time, that he remained on HUK's payroll, and that "[h]e was certainly the head of [HUK's] estimating team" in connection with Contract 20A. Thus, based on Towsey's testimony the jury could have reasonably found that Young learned of the conspiracy and contributed to it in his capacity as an HUK employee. In sum, then, Young's actions provided sufficient evidence for the jury to conclude that HUK knowingly joined the conspiracy.

HUK next challenges the jury's finding that it committed substantive FCA violations, *i.e.*, that it "knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim" and "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement material to a false or fraudulent claim" with respect to Contract 20A. 31 U.S.C. § 3729(a). We have no need to address this argument. Because the jury had sufficient evidence to find that HUK conspired to submit false bids, *supra* at 58, HUK was liable for its co-conspirators' foreseeable actions in support of the conspiracy. *See, e.g.*, *Halberstam*, 705 F.2d at 481. And as explained in Part II.G.1, BIE's admission that it both conspired to and did submit false claims with respect to Contract 20A was properly admitted against all of the defendants. That admission thus provides sufficient evidence for the jury to have found HUK liable for false claims submitted on Contract 20A. We therefore turn to the defendants' challenges to the jury's calculation of damages.

3. Damages

As the parties agree, the measure of damages is the difference between what the United States paid and what it would have paid had there been no bid-rigging agreement. Because the plaintiffs' claims on Contracts 29 and 07 are barred by the statute of limitations, *see* Part II.A.2, we need consider damages only as to Contract 20A. After being instructed on the proper standard, the jury awarded damages of $29.9 million on that contract. HUK and BIE challenge the award on two independent grounds. First, they contend that the plaintiffs presented insufficient evidence to support the jury's finding. Second, they argue that the district court permitted the plaintiffs to argue an improper damages theory to the jury and that this error requires a new trial.

Regarding the sufficiency of the evidence, the defendants assert that "plaintiffs failed altogether to prove that USAID incurred [any] loss" from the bid rigging on Contract 20A. This claim rests on the contention that no defendant attended the bid-rigging meetings led by Schmidt on behalf of Holzmann—indeed, that no defendant even knew about the meetings—and that Harbert-Jones therefore could not have raised its bid based on Schmidt's agreements with the other Contract 20A bidders. Our earlier discussion explains why this argument fails: a reasonable jury could have concluded that Anderson and Young, representing the Harbert side of the Harbert-Jones venture, knew about the bid-rigging plan when they attended the venture's June 1988 bid-reconciliation meeting and that, based on that knowledge, they aggressively advocated a higher bid.

Moreover, the jury heard substantial evidence that the payment Harbert-Jones ultimately received for its work on Contract 20A was well above what it could have obtained through a competitive bidding process. Although the joint venture's bid rose and fell several times between the June 1988 bid reconciliation meeting and the final award of the contract, in the end, executives at Jones described their profits as "exorbitantly wonderful." Indeed, the plaintiffs' expert testified that Harbert-Jones reaped profits of 52%; other witnesses testified that the norm for construction jobs of this type is 7 to 15%. The plaintiffs' expert also detailed several complicated financial transactions that BIE undertook to hide $25 million of this profit. Contrary to the defendants' argument, it required no speculation for the jury to conclude that the defendants overcharged on Contract 20A.

As to the amount of the award, the defendants argue that even if the plaintiffs successfully proved some degree of bid inflation, "there is no correlation between the $29,920,000 jury award and *any* of the various amounts plaintiffs urged the jury to assess." When considering a sufficiency of the evidence challenge to a jury's damages award, "[o]ur inquiry ends once we are satisfied that the award is within a reasonable range and that the jury did not engage in speculation or other improper activity." *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1239 (D.C. Cir. 1984). Especially in a case like this, "[w]here the jury finds a particular quantum of damages and the trial judge refuses to disturb its findings," we must be "certain indeed that the award is *contrary to all reason*" before reversing the jury and the district court. *Id.* (internal quotation marks omitted). And in determining what constitutes a "reasonable range" for the jury's award, we make allowances for the fact

that the defendants' own misconduct has foreclosed any exact calculation of what a competitive bid would have been on Contract 20A. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) ("[W]here the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork[,] [b]ut [it] may make a just and reasonable estimate of the damage based on relevant data.").

At trial, the plaintiffs suggested several methods for estimating the extent of the bid inflation on Contract 20A. We highlight two, each of which demonstrates that the jury's award falls "within a reasonable range." *Carter*, 727 F.2d at 1239.

First, the plaintiffs urged the jury to begin with the defendants' actual final costs on Contract 20A of $52 million, and then add a generous 25% profit margin (as described above, the jury heard testimony that profit on a contract like 20A would normally have been 7 to 15%), thus yielding a final bid of $65 million. Since Harbert-Jones ultimately submitted invoices totaling $107 million, this calculation suggested damages of $42 million ($107 million minus $65 million), comfortably above the jury's actual $29.9 million award.

Alternatively, the plaintiffs suggested that the jury could estimate the competitive bid amount for the final Contract 20A specification by starting with either of two "free of influence" estimates for the original, larger version of the contract, and then discounting whichever estimate it chose for the subsequent scope of work changes. The two estimates the plaintiffs suggested as a baseline were: (1) $95 million, the bid proposal prepared by Jones before its June 1988 reconciliation meeting with the

Harbert side of the venture, and (2) $80 million, the bid amount apparently considered by Fuller before deciding not to bid on Contract 20A. Proportionately reduced for the subsequent changes to Contract 20A that led Harbert-Jones to lower its bid from $129 to $115 million (an 11% reduction), these estimates suggest that the competitive bid amount on the final contract would have been between $71 and $85 million, indicating damages of $22 to $36 million. The jury's actual award—$29.9 million—falls squarely within this range. The jury's award thus easily survives our deferential standard of review.

Finally, the defendants argue that the district court allowed the plaintiffs to present an improper damages theory to the jury. Specifically, they contend that by allowing the plaintiffs' counsel to refer occasionally to the proper measure of damages as what the Government "should" have paid rather than what it "would" have paid absent the bid rigging, the district court allowed the plaintiffs to suggest that the jury calculate damages by disgorging the defendants' Contract 20A profits. *Cf. United States ex rel. Harrison v. Westinghouse Savanna River Co.*, 352 F.3d 908, 923 (4th Cir. 2003) (finding disgorgement of all government payments on a fraudulently obtained contract to be an inappropriate remedy under the FCA). "[W]here a jury was permitted to consider an improper standard of damages," the defendants argue, "the reviewing court must reverse unless it can be assured that the verdict was not based on [the] erroneous standard." In its post-trial order, however, the district court pointed out that its jury instructions set out the proper damages standard and found that these instructions "eliminated any confusion engendered by plaintiffs' counsel[]." 563 F. Supp. 2d at 108 n.68.

Reviewing the district court's denial of a new trial for abuse of discretion, we find none. To begin with, we doubt very much that the few offhand references to what the Government "should have paid" could have misled the jury. As the plaintiffs point out, "what the Government 'should have paid' can readily be understood as what the Government ought to have paid on the contracts absent Defendants' wrongdoing." Indeed, in describing the proper measure of damages in his closing argument, the plaintiffs' counsel used the phrase "should have paid" in just this way: "[T]he measure of the damage will be . . . that difference between what [the Government] paid and what [it] should have paid if the bidding had not been rigged and the competition had been free, robust, and vibrant." But even if these scattered "should have paid" references may have confused the jury, we agree with the district court that its instructions eliminated any prejudice. The court explained to the jurors that "the measure of damages to the United States is the difference between what the United States paid and what it would have paid had there been no bid-rigging agreement." As the district court was entitled to presume that the jurors "follow[ed] the instructions they [were] given," *United States v. Mouling*, 557 F.3d 658, 665 (D.C. Cir. 2009), its denial of the defendants' motion for a new trial was well within its discretion.

III. Conclusion

For the foregoing reasons we (1) vacate the judgment of the district court, pursuant to the statute of limitations, with respect to the claims concerning Contracts 07 and 29; (2) vacate the judgment against the defendants HII, HC, and BHIC and remand the

matter for a new trial because the district court erred in admitting testimony about the wealth of HII and HC and statements contrary to the stipulation about BHIC's existence; and (3) affirm the judgment with respect to the claims concerning Contract 20A against the remaining defendants, namely BIE and HUK.

So ordered.

TATEL, *Circuit Judge*, dissenting from Parts II.A.2 and II.G.4: In Part II.A.2 the court finds the Government's claims on Contracts 29 and 07 barred by the False Claims Act's statute of limitations, and in Part II.G.4 it rules that testimony and evidence regarding the defendants' wealth was so prejudicial as to require a new trial for HII and HC. I respectfully dissent from both rulings.

I.

Under the False Claims Act (FCA) as recently amended, the Government's complaint in intervention inherits the filing date of the *qui tam* relator's complaint that initiated the action "to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint." attempted to be set forth, in the prior complaint." 31 U.S.C. § 3731(c). In this case, the "conduct, transactions, or occurrences set forth, or attempted to be set forth" in Richard occurrences set forth, or attempted to be set forth" in Richard Miller's 1995 complaint involved a Frankfurt-based conspiracy to rig bidding for multiple USAID contracts in Egypt. This court denies relation back of much of the Government's complaint in intervention because two contracts the Government alleges were part of that conspiracy, Contracts 29 and 07, were not mentioned in Miller's original complaint. Yet in the very first sentence in which Miller described the conduct at issue, he left no doubt that he was accusing the defendants of fraud spanning more than one USAID project: "Defendants conspired to rig the bidding for construction *contracts* paid for by the United States Agency for International Development." Miller Compl. ¶ 1 (emphasis added). Emphasizing that he

was alleging fraud involving more than one contract, he continued, "The particular transaction *about which most is known* is Contract 20A." *Id.* (emphasis added). After detailing the bid rigging on Contract 20A, *id.* ¶¶ 1, 15–30, Miller again made clear that the conspiracy he was alleging was not limited to that particular contract: "Plaintiff has received information that there was a 'club' in Frankfurt, Germany of contractors qualified to perform AID contracts in Egypt; the club was organized to control prices in what should have been full and open competition for AID contracts." *Id.* at ¶ 33. Indeed, Miller predicted that discovery would uncover additional rigged contracts: "Upon information and belief, discovery in this case will reveal that other AID contracts in Egypt were subject to similar and related collusive agreements on price that resulted in the submission of other false or fraudulent claims to the U.S. Government." *Id.* Finally, in the complaint's formal counts, Miller neither mentioned Contract 20A nor limited his claim for damages to the allegedly false claims on that contract (estimated earlier in the complaint at $40 million). Instead, he "incorporate[d] the allegations of" the preceding paragraphs by reference, *id.* ¶¶ 34, 37, including the allegation of "other false or fraudulent claims" arising from "other AID contracts in Egypt," *id.* at ¶ 33, and sought "actual damages in an amount to be proven at trial," *id.* ¶¶ 36, 39.

From the face of Miller's complaint, it is thus clear that the "conduct, transactions, or occurrences set forth, or attempted to be set forth" encompassed bid bid-rigging not just on Contract 20A (identified by Miller in his original complaint) but also on Contracts 29 and 07 (later added by the Government in its complaint in intervention). The Government's claims on Contracts 29 and 07 "arise[] out of" the Frankfurt-based bid rigging conspiracy originally alleged by Miller—indeed, the "collusive agreements" on these contracts were precisely what Miller predicted discovery would unearth. *Id.* ¶ 33. For this reason, the Government's claims relate back to Miller's original complaint and are therefore not barred by the FCA's statute of limitations. As we have said, "an amendment offered for the purpose of adding to or amplifying the facts already alleged in support of a particular claim may relate back." *United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002).

According to the court, "[a]llegations concerning Contract 20A do not fairly encompass Contracts 07 or 29 because each contract is unique." Ct. Op. at 18. In support, it says that "each contract required work to be performed on a different project and was awarded in a different year to a different winning bidder drawn from a different pool of prequalified bidders." *Id.* This misses the point. Of course the three contracts were different. As is typical in government contracting, USAID and the Egyptian government divided the sewer improvements into multiple contracts signed on different dates. What matters for relation back purposes is that the three contracts were all part of the "conduct," i.e., the Frankfurt-based bid-rigging conspiracy, alleged in Miller's original complaint.

The three contracts, moreover, are not nearly as different as the court suggests. Although each contract was awarded to a "different winning bidder," *id.*, the winners on Contracts 20A and 07 were identical in structure—each was owned 60% by HII and 40% by Jones—and the defendants' financial statements treated them as a single entity, the "Harbert-Jones Egypt Joint Venture." Indeed, had Holzmann not agreed that Harbert-Jones would overbid the contract in exchange for a $4 million loser's fee from its competitor, HII and Jones might have won Contract 29 as well. Moreover, while it is true that the pool of bidders varied among contracts, there were important overlaps: HII and Jones, through their joint ventures, were prequalified to bid on all three, and Fru-Con was prequalified for Contracts 20A and 07. Indeed, "Fru-Con (through its parent company, Bilfinger & Berger), received payoffs for cooperating on Contracts 20A and 07," Ct. Op. at 55. In addition, Fuller, which was prequalified for Contract 20A, also submitted prequalification information on Contract 29 but was ultimately found ineligible. And when Fuller's parent corporation and Holzmann rigged the bidding on Contract 20A, they signed an agreement "expressly contemplat[ing] future collusion on Contract 29." *Id.* at 54.

The court relies on *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857 (D.C. Cir. 2008), but that case is very different from this one. There, a group of wholesale drug purchasers alleged that Biovail, a drug manufacturer, misused a patent it owned to keep "generic versions" of one of its brand name drugs off the market. The complaint named one particular generic competitor, developed by a company called Andrx, that Biovail had blocked. *Id.* at 866. In their

amended complaint, the plaintiffs alleged for the first time that Biovail, along with its exclusive distributor, Forest Laboratories, also violated the antitrust laws through their "decision not to sell *their own* generic." *Id.* (emphasis added). We disallowed relation back of this new allegation even though the original complaint accused the defendants of blocking "generic *versions*" of the drug. *Id.* (emphasis added). According to my colleagues, Miller's use of the plural—"Defendants conspired to rig the bidding for construction *contracts*," Miller Compl. ¶ 1—likewise cannot support relation back of the Government's subsequent allegations.

Our decision in *Meijer*, however, rested on the fact that "the whole thrust of the amendments [was] to fault both Biovail and Forest . . . for conduct different from that identified in the original complaint." *Meijer*, 533 F.3d at 866. As we interpreted the plaintiffs' original complaint, it alleged that Biovail, acting alone through misuse of its patent, was "bent upon preventing the FDA from granting final approval of the generic drug proposed by Andrx (and perhaps others)." *Id.* The plaintiffs' amended complaint, however, differed in two important respects. First, it added claims against Forest, "alleg[ing] for the first time that Biovail and Forest unlawfully conspired to extend their lawful monopoly." *Id.* Second, it alleged an entirely different means of unlawful monopolization, i.e., that Biovail and Forest "planned preemptively to introduce their own generic Diltiazem HCl, and that they unlawfully abandoned that plan." *Id.* Thus, our decision in *Meijer* flowed from the well established principle that "an amendment . . . that attempts to introduce a new legal theory based on facts different from those underlying the timely claims may not" relate back. *Hicks*, 283 F.3d at 388.

Here by contrast the Government's theory of liability on Contracts 29 and 07 is identical to that first pleaded by Miller, namely that the defendants entered into a Frankfurt-based conspiracy to rig the bidding on USAID contracts in Egypt, and that through that conspiracy, the defendants rigged the bidding not just on Contract 20A, but also on Contracts 29 and 07. Indeed, in *Meijer* we suggested that relation back may well have been appropriate had the plaintiffs there—like the Government here—simply added additional examples of the unlawful conduct alleged in the original complaint. 533 F.3d at 866 (describing plaintiffs' original allegations regarding "generic versions" of Biovail's drug as encompassing "the generic drug proposed by Andrx (*and perhaps others*)" (emphasis added)).

My colleagues also rely on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), in which the Supreme Court held that to survive a motion to dismiss, a complaint must provide more than "'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 557). Characterizing Miller's conspiracy allegation as such an assertion, the court concludes that it cannot support relation back of the Government's claims on Contracts 29 and 07. This argument suffers from two fundamental defects. To begin with, the defendants raised it neither here nor in the district court, and as we have repeatedly said, "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Second, and setting aside the fact that the allegations in Miller's original complaint, which

identified the conspiracy as based in Frankfurt, described the scope of its operations (USAID contracts in Egypt), and detailed its bid-rigging on Contract 20A, are a far cry from the "naked assertions" that doomed the complaints in *Twombly* and *Iqbal*, those two cases have no applicability to the question before us. In *Twombly* and *Iqbal* the Supreme Court interpreted Federal Rule of Civil Procedure 8(a)(2), which sets the standard that a complaint must satisfy to survive a motion to dismiss. Nothing in either case even hints that the Supreme Court intended Rule 8(a)'s standards to apply to relation back, which is governed by the entirely different language of Rule 15(c), now incorporated into the FCA. In fact, my colleagues' invocation of *Twombly* and *Iqbal* contradicts the FCA's plain text, which provides that claims relate back not only to "conduct, transactions, or occurrences set forth," in an earlier complaint, but also to "conduct, transactions, or occurrences . . . *attempted to be* set forth." 31 U.S.C. § 3731(c) (emphasis added); *cf. Krupski v. Costa Crociere S.p.A.*, 560 U.S. __, No. 09-337, slip Op. at 13 (June 7, 2010) (emphasizing, with respect to relation back of parties, that Rule 15 "plainly sets forth an *exclusive* list of requirements for relation back," and "*mandates* relation back once the Rule's requirements are satisfied" (emphasis added)). Indeed, two other circuits have expressly held, in language we have cited with approval, that an "amended claim arises from the same conduct and occurrences upon which the original claim was based," and therefore relates back, even if (unlike here) "the original claim contained insufficient facts to support it." *Dean v. United States*, 278 F.3d 1218, 1222 (11th Cir. 2002); *see also id.* ("One purpose of an amended claim is to fill in facts missing from the

original claim."); *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000) (an amendment that "seeks to correct a pleading deficiency by expanding the facts but not the claims alleged" in an earlier filing "would clearly fall within Rule 15(c)"); *Hicks*, 283 F.3d at 388 (quoting *Dean* and *Thomas*). In FCA cases, the time for defendants to file *Iqbal* motions, and thus to ensure that Rule 8(a)'s pleading standards are not "circumvent[ed]," Ct. Op. 18, is when the relator's complaint is unsealed. And where, as here, the Government files a complaint in intervention and the relator an amended complaint, it is those two complaints, not the relator's initial, sealed complaint, that are tested against the *Iqbal* standard.

When Miller filed his 1995 complaint, he knew that contracts other than 20A were involved in the Frankfurt Club conspiracy. Congress added the relation back provision to the FCA precisely for situations like this—to allow "a complete and thorough investigation of the merits of a *qui tam* relators' allegations." S. Rep. No. 110-507, at 28–29 (2008) (report on the False Claims Correction Act of 2008, a FERA predecessor). By interpreting Miller's complaint as limited to the one contract he was able to identify by number when he first filed, and by applying *Twombly* and *Iqbal* to Miller's original, sealed complaint, this court deprives the Government of the fruits of just such an investigation and frustrates congressional intent.

II.

After the jury returned its verdict, HII and HC sought a new trial, arguing that the plaintiffs' counsel's questioning of one witness, together with his closing argument, introduced unfairly prejudicial evidence about the defendants' wealth. The district

court found that much of the wealth evidence was relevant and that in any event, it was not so prejudicial as to require a new trial. *Miller v. Holzmann*, 563 F. Supp. 2d 54, 110–13; *see* Fed. R. Civ. P. 61 (all trial errors are harmless unless they affect "substantial rights"). This court now finds that the district court abused its discretion in failing to order a new trial for HII and HC. I cannot agree. Faced with "only a cold record," *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 281 (5th Cir. 1975), I would defer to the judgment of the experienced district judge who conducted this seven-week trial and observed the witnesses.

The plaintiffs' counsel elicited information from Raymond Harbert about the assets and structure of HII, HC, and non-party Harbert Management Company. The district court found this testimony—at least with respect to HII and HC—relevant to the Government's alter ego theory, i.e., its argument that as HII's parent, HC completely controlled HII and ignored its separate corporate existence, making it responsible for HII's actions. The district court grounded its relevance finding in circuit precedent establishing that the undercapitalization of a subsidiary corporation may suggest the existence of just such an improper relationship. *Miller*, 563 F. Supp. 2d at 111 (discussing *Labadie Coal Co. v. Black*, 672 F.2d 92 (D.C. Cir. 1982)). In other words, according to the district court, Raymond Harbert's testimony was relevant because it could have suggested to the jury that adherence to the corporate form might have permitted HC "to evade the impact of a judgment against an inadequately capitalized HII." *Id.*

Having found some of Raymond Harbert's testimony relevant, the district court applied Federal Rule of Evidence 403, asking whether the testimony presented a risk of unfair prejudice that substantially outweighed its probative value. Although recognizing that "knowledge that a defendant has the resources to pay a judgment may increase jurors' comfort level in making a large damages award," the district court found that "a bare handful of remarks in the course of a seven-week trial" fell short of "creat[ing] such unfair prejudice as to *substantially outweigh* the significant probative value" of the evidence. *Id.* at 112. A new trial was unnecessary, the district court explained, because "plaintiffs here never even approached the sort of egregious misconduct and overt pandering that have compelled reversal or a new trial in other cases." *Id.*

With little explanation, this court now rejects the district court's relevance analysis. Ct. Op. at 48–49. More troubling, the court disregards the district court's determination of prejudice. But even if, as this court finds, much of the wealth testimony was in fact irrelevant, we owe substantial deference to the district court's determination that the testimony was not so prejudicial as to "affect . . . substantial rights." Fed. R. Civ. P. 61. Indeed, because we have long recognized that the district court's proximity to the trial places it in a far better position to determine prejudice, "[w]e review a trial court's evidentiary rulings for abuse of discretion . . . [and] [e]ven if we find error, we will not reverse an otherwise valid judgment unless appellant demonstrates that such error affected her 'substantial rights.'" *Whitbeck v. Vital Signs, Inc.*, 159 F.3d 1369, 1372 (D.C. Cir. 1998) (citations omitted).

Given that the trial lasted for seven weeks, that the evidence was hardly close, and that the court points to only one series of questions and a single comment in which the defendants' wealth was raised, I cannot say that the district court abused its discretion in refusing to order a new trial. *See, e.g.*, *United States v. Mejia*, 597 F.3d 1329, 1342 (D.C. Cir. 2010) ("embellishment" in prosecutor's closing argument did not require a new trial "where the statement was isolated and the case was not close"). Although my colleagues may well be correct that "[e]vidence need not be reinforced and reiterated again and again for it to be prejudicial enough to warrant a new trial," Ct. Op. at 50, such limited evidence does tend to suggest limited prejudice. *Cf. Koufakis v. Carvel*, 425 F.2d 892, 901–05 (2d Cir. 1970) (district court's refusal to order a new trial constituted an abuse of discretion where counsel made inappropriate comments "[t]hroughout his presentation at trial and in summation," including "many references" likening defendant to a Mafia boss; engaged in "repeated name-calling, such as referring to [defendant] . . . as 'liar,' 'faker,' 'phony,' and 'perjurious'"; "theme[]" throughout trial "that the case was one which pitted a 'little' and virtuous man of modest resources against a powerful and unscrupulous man with untold wealth."). Because the district court was in a far better position than we to weigh the evidence and determine its effect on substantial rights, I would defer to its judgment.

III.

For the foregoing reasons, I would affirm the district court's ruling that the Government's claims on Contracts 29 and 07 relate back to Miller's 1995 complaint, as well as its finding that the plaintiffs'

references to wealth do not require a new trial. And because I agree with the remainder of the district court's rulings, substantially for the reasons given, I would affirm as to all three contracts and, except for BHIC, *see* Ct. Op. at 30–33, as to all defendants.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-1231 (RCL)

RICHARD F. MILLER,
Plaintiff,

v.

PHILIPP HOLZMANN, *et al.*,
Defendants.

MEMORANDUM OPINION

Ironically enough, this sordid tale of filthy dealing and dirty money began in the sewers of Cairo. After the Camp David Accords of 1979, the United States saw an opportunity to reward Egypt for its recognition of Israel with funding for public works projects. According to plaintiffs' evidence, defendants also saw an opportunity: to enrich themselves at U.S. taxpayers' expense by colluding to secure, and then overcharge on, contracts for these projects.

Nearly twenty years after these underlying events, this multi-defendant[1] conspiracy case came to

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[1] Of the numerous defendants named in relator Richard F. Miller's ("Miller") original complaint, seven proceeded to trial last spring: individual defendants Bill L. Harbert ("Harbert") and E. Roy Anderson ("Anderson"); and corporate defendants Harbert Corporation ("HC"), Harbert International, Inc. ("HII"), Bill Harbert International Construction, Inc. ("BHIC"), Bilhar International Establishment f/k/a Harbert International Estab-

trial.[2] Over the course of seven weeks, a jury absorbed a vast amount of evidence, including testimony from forty-one witnesses and over 500 exhibits, and witnessed a vigorous and thorough defense. After resolving numerous factual disputes and weighing the credibility of each witness, the jury returned a verdict for plaintiffs on May 14, 2007, awarding over $34 million in damages to the United States. This Court ultimately fixed total liability at $90,438,087.66.[3]

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lishment ("Bilhar" or "HIE"), and Harbert Construction Services (U.K.) Ltd. ("HUK"). The Court dismissed plaintiffs' claims against Harbert on April 27, 2007, on statute of limitations grounds. (See Order of May 4, 2007 [854], at 3.)

[2] Relator filed his original complaint under seal on June 30, 1995. The government then spent nearly six years investigating his allegations. Judge William B. Bryant unsealed the case on February 12, 2001. Another five years passed before the case was reassigned to this Court, on December 2, 2005. After allowing just over one year for discovery and pretrial proceedings, this Court commenced trial on March 19, 2007.

[3] The jury apportioned damages among the three contracts at issue as follows: $29,920,000.00 on Contract 20A, $3,400,000.00 on Contract 29, and $1,026,029.22 on Contract 07. (Verdict Form [858] at 9, 10, 12.) In accordance with 31 U.S.C. section 3729(a), the Court then trebled the damages award for each contract. (Mem. Op. of Aug. 10, 2007 [882] at 11.) The Court next set off amounts the government received from settling co-defendants, apportioning the $13.7 million total across the three contracts. (*Id.* at 10-11.) It further determined the appropriate civil penalty to be $10,000 per false claim, yielding a total penalty of $1,100,000.00. (*Id.* at 7-9, 11.) The Court calculated the total liability in this case—the sum of the trebled damages and civil penalties—to be $90,438,087.66, for which defendants BHIC, HII, HC, and Bilhar are jointly and severally liable. (*Id.* at 11.) Because the jury found defendant HUK liable on only Contract 20A, it shared joint and several liability on $78,825,454.00 of this amount. (*Id.*) Finally, because the Court

Each defendant now challenges the jury's verdict and/or the Court's judgment.[4] Their motions present issues relevant to both liability and damages. Defendants' challenges, in their new trial motions, to this Court's evidentiary and other rulings necessarily implicate the sufficiency of the evidence objections raised by their motions for judgment as a matter of law. Hence, this Opinion first considers defendants' proposed grounds for a new trial, then considers the sufficiency of the evidence along with defendants' other offered bases for judgment as a matter of law,

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had dismissed all claims against defendant Anderson save one on statute of limitations grounds, he shared joint and several liability in the amount of $149,615.20. (*Id.* at 11-12.)

[4] For convenience and brevity, the Court will cite the parties' motions as follows: Anderson's Post-Judgment Motions [893] ("Motion One"); HII's Motion for Judgment as a Matter of Law [894] ("Motion Two"); HC's Motion for Judgment as a Matter of Law [895] ("Motion Three"); BHIC and HUK's Motion for Judgment as a Matter of Law [896] ("Motion Four"); HII and HC's Motion for a New Trial as to All Claims [897] ("Motion Five"); Bilhar's Motion for Post-Trial Judgment as a Matter of Law, or in the Alternative, for a New Trial [898] ("Motion Six"); BHIC and HUK's Motion to Alter, Amend, or Vacate the Judgment [899, 901] ("Motion Seven"); and BHIC and HUK's Motion for New Trial [900, 904] ("Motion Eight"). Corresponding opposition briefs and replies will be similarly numbered.

Where appropriate, the Court will indicate which defendant(s) make(s) which arguments, but in large part, defendants have incorporated one another's arguments by reference. (E.g., Motion Two at 1 n.1 (joining arguments and requests for relief in Motion Eight, Sections I-IV; Motion Four, Sections IV-VI; Motion Seven, Sections I-II, IV; and Motion One, Sections 1-5); Motion Three at 1 n. 1 (incorporating same arguments and requests, along with those made by HII in Motion Two); Motion Six at 1 (adopting "all other contentions made by all other defendants in their respective post-trial motions").)

and finally evaluates certain defendants' arguments for remittitur and/or relief.

I. Applicable Legal Standards

A. Rule 59(a)—New Trial

Federal Rule of Civil Procedure 59(a) affords a court discretion to grant a new trial on all or some issues "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). Such reasons have included excessive damages, "substantial errors . . . in the admission or rejection of evidence[,] or the giving or refusal of instructions." *Nyman v. FDIC*, 967 F. Supp. 1562, 1569 (D.D.C. 1997) (Urbina, J.). Yet "minor evidentiary errors . . . in the course of a long trial," do not suffice. *Wild v. Alster*, 377 F. Supp. 2d 186, 189 (D.D.C. 2005) (Walton, J.) (quotation marks and citations omitted). Rather, the court's discretion to grant a new trial—which is to be exercised "sparingly and cautiously," *Miller v. Penn. R.R. Co.*, 161 F. Supp. 633, 641 (D.D.C. 1958) (Holtzoff, J.)—"has generally been understood to include actions rendering the trial unfair." *Sparshott v. Feld Entm't, Inc.*, 311 F.3d 425, 433 (D.C. Cir. 2002). Only "a clear miscarriage of justice," *Wild*, 377 F. Supp. 2d at 189, or "manifest error of law or fact" will warrant a new trial, *Nyman*, 967 F. Supp. at 1569.

When a court concludes that the jury's "verdict is against the weight of the evidence," rather than grant judgment as a matter of law, it may instead order a new trial. *Nyman*, 967 F. Supp. at 1569; *see* Fed. R. Civ. P. 50(b)(2). "The standard for a new trial is less onerous than the one applicable to a Rule 50 motion." *Nyman*, 967 F. Supp. at 1569. But just as with a motion for judgment as a matter of law, the

Court should "not disturb a jury verdict 'unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the verdict.'" *Duncan v. Wash. Metro. Transit Auth.*, 240 F.3d 1110, 1113 (D.C. Cir. 2001) (en banc) (quoting *Curry v. District of Columbia*, 195 F.3d 654, 659 (D.C. Cir. 1999)).

B. Judgment as a Matter of Law—Rule 50

Under Federal Rule of Civil Procedure 50, a court may, on motion, direct entry of judgment contrary to a jury verdict when "a reasonable jury would not have a legally sufficient evidentiary basis to find for that party on that issue." Fed. R. Civ. P. 50(a). Courts "do not, however, lightly disturb a jury verdict." *McGill v. Munoz*, 203 F.3d 843, 845 (D.C. Cir. 2000). A court may enter judgment contrary to that verdict only when "the evidence[,] and all reasonable inferences that can be drawn therefrom[,] are so one-sided that reasonable men and women could not" have reached the jury's verdict. *Scott v. District of Columbia*, 101 F.3d 748, 752 (D.C. Cir. 1996).

"[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the movant that the jury was not required to believe." *In re Lorazepam & Clorazepate Antitrust Litig.*, 467 F. Supp. 2d 74, 80 (D.D.C. 2006) (Hogan, C.J.) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000)). Further, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

255 (1986). Thus, a court should grant a Rule 50 motion only when, "under the governing law, there can be but one [] conclusion as to the verdict"—that it defies reason. *Id.* at 250.

C. Remittitur—Rule 60(b)

Federal Rule of Civil Procedure 60(b) empowers courts to grant relief from a final judgment when "the judgment has been satisfied, released, or discharged." Fed. R. Civ. P. 60(b)(5). "[A] motion for a credit on a judgment should be treated as a Rule 60(b)(5) motion for relief from [that] judgment." *Kassman v. Am. Univ.*, 546 F.2d 1029, 1033 (D.C. Cir. 1976) (per curiam). Like a motion for a new trial, "the decision to grant or deny a rule 60(b) motion is committed to the discretion of the District Court." *United Mine Workers 1974 Pension v. Pittston Co.*, 984 F.2d 469, 476 (D.C. Cir. 1993).

D. Alteration or Amendment—Rule 59(e)

Federal Rule of Civil Procedure 59(e) provides for alteration or amendment of a previously-entered judgment. Fed. R. Civ. P. 59(e). "While the court has considerable discretion in ruling on a 59(e) motion, the reconsideration and amendment of a previous order is an extraordinary measure." *Zyko v. Dep't of Def.*, 180 F. Supp. 2d 89, 90 (D.D.C. 2001) (Urbina, J.). Hence, such a motion "need not be granted unless the district court finds that there is . . . 'the need to correct a clear error or prevent manifest injustice.'" *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (quoting *Nat'l Trust v. Dep't of State*, 834 F. Supp. 453, 455 (D.D.C. 1993)).

II. New Trial Motions

A. Prior Criminal Proceedings

In 2002, Defendant Bilhar pleaded guilty to an antitrust conspiracy in violation of the Sherman Act, 15 U.S.C. section 1. (*See* Exs. A, B to Pl.'s Mot. [558].) In its Order of March 14, 2007, this Court granted plaintiffs' motion *in limine* [558] to preclude Bilhar from contesting its liability on Contracts 20A and 29 based on this plea. (See Mem. Op. & Order of Mar. 14, 2007 [713] at 5-6; Mem. Op. & Order of Mar. 20, 2007 [738] at 1-2 (denying motion for reconsideration).) The Court subsequently admitted both Bilhar's plea agreement and the accompanying Joint Rule 11 Memorandum, against all defendants, under Federal Rule of Evidence 803(22). (Mem. Op. & Order of Mar. 16, 2007 [722] at 3-4; Mem. Op. & Order of Mar. 20, 2007 [73 8] at 2 (denying motion for reconsideration); Mem. Op. & Order of Mar. 21, 2007 [743] at 4-5 (denying motion to sever).) Defendants challenge both rulings.[5]

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[5] Defendants also challenge this Court's refusal to strike testimony given by Rainer Hermann at defendant Anderson's criminal trial, which this Court admitted against Anderson, alone, under Federal Rule of Evidence 804(b)(1). (Mem. Op. & Order of Mar. 16, 2007 [722] at 4-7.) They contend this evidence was relevant only to plaintiffs' claims concerning Contracts 20A and 07, and that once this Court dismissed those claims against Anderson on statute of limitations grounds, it should have stricken the testimony. (Motion Five at 10.) They further insist the jury must have erroneously predicated its verdict against the other defendants on Hermann's testimony because it "was the sole source of first-hand evidence that Holzmann actually paid a loser's fee to [Bilfinger & Berger] on Contract 07." (*Id.*)

This claim lacks merit for two reasons. First, while Hermann's testimony may have been the only *first-hand* evidence of the loser's fee, it was not the *only* evidence. Werner Hoffmeister

1. Collateral Estoppel

"Courts have often held that issues determined in connection with a criminal conviction may be preclusively established in later civil trials." *Otherson v. Dep't of Justice*, 711 F.2d 267, 271 (D.C. Cir. 1983). While recognizing that at least seven other Circuits have done so, our Court of Appeals has not taken a definitive position on whether issues determined in connection with a defendant's *guilty plea* may similarly be given preclusive effect. *Id.* at 275 n.8.

Meanwhile, district courts in this Circuit have routinely treated criminal convictions—including those

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subsequently testified that "after several discussions, Holzmann paid the loser's fee" of 1.5 million dollars or deutschmarks. (Mar. 22, 2007 PM Tr. at 68-70, 86-87.) To the extent the jury considered the Hermann testimony against the other defendants, it was merely cumulative of other evidence.

Second, and more fundamentally, this Court twice instructed the jury that it should consider Hermann's testimony *only* against Anderson. (Mar. 22, 2007 PM Tr. at 101; May 4, 2007 AM Tr. at 42-43.) While defendants dismiss this notion as "pure sophistry," (Reply Five at 7), the law presumes that jurors follow their instructions, *see, e.g., Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (citing "the almost invariable assumption of the law that jurors follow their instructions"). Defendants' internally inconsistent argument does not persuade the Court to abandon this bedrock presumption. They contend "the only way the Court could have assured the jury . . . would not misuse the Hermann testimony"—in violation of this Court's repeated limiting instruction—"was to strike it"—by issuing yet another instruction. (Reply Five at 8.) Defendants do not elaborate on why they believe the jury would wholly disregard one instruction but adhere scrupulously to another, and the distinction is not evident to the Court.

For these reasons, the Court concludes any error in its refusal to strike the Hermann testimony after dismissing the Contract 20A and 07 claims against Anderson was harmless.

based on guilty pleas—"[a]s conclusive proof of the facts supporting the conviction," and have thus given them preclusive effect in subsequent civil actions. *See, e.g., Int'l Telecomm. Satellite Org. v. Colino*, No. 88-1266, 1992 U.S. Dist. LEXIS 4887, at *20 (D.D.C. Apr. 15, 1992) (Lamberth, J.); *United States v. Uzzell*, 648 F. Supp. 1362, 1363 (D.D.C. 1986) (Green, J.). As a general matter, issue preclusion between the same parties[6] is available where, in the prior proceeding, (1) an identical issue[7] (2) was actually litigated (3) and necessarily determined, and where (4) "[p]reclusion in the second trial [would] not work an unfairness." *Otherson*, 711 F.2d at 273. When the proceeding is a criminal one, and the defendant enters a guilty plea,

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[6] The "same parties" requirement was crucial to the *Otherson* court's attempt to reconcile other circuits' extension of issue preclusion to facts established by a guilty plea, with apparently contrary dicta in a recent U. S. Supreme Court decision. 711 F.2d at 275 n.8, 277 n.11. The court ultimately identified "a middle ground" in which a plea's preclusive effect would turn on whether the government, as opposed to a new party, sought to invoke preclusion in the later civil action. *Id.* at 277 n.11. This distinction makes particular sense where in the second trial, "the government [is] enforcing . . . a form of civil relief arising out of the original crime" because such "a claim [] would presumably have been barred the second time under claim preclusion were criminal courts not specialized tribunals." *Id.* Here, because the United States is a plaintiff and seeks civil relief for harm arising from the Sherman Act conspiracy, the "same parties" requirement is clearly satisfied.

[7] Bilhar briefly contends preclusion was erroneous here because "[t]he claims in the criminal and the instant civil case were not identical." (Motion Six at 2.) While Bilhar is, indeed, correct that a Sherman Act conspiracy need not involve submission of any false statement to the government, its assertion nonetheless misses the mark. The collateral estoppel doctrine requires merely identity of issues, not identity of *claims*. *See* Restatement (Second) of Judgments § 27 (1982).

preclusion "extends only to those issues that were essential to the plea." *Alsco-Harvard Fraud Litig.*, 523 F. Supp. 790, 802 (D.D.C. 1981) (Oberdorfer, J.).

Bilhar now insists it merits a new trial because the central issues in the False Claims case were not essential to its plea to antitrust conspiracy. (Motion Six at 2; Reply Six at 7-9.) Before examining this contention, the Court must first elucidate precisely which issues it precluded Bilhar from contesting in this civil trial. This Court treated Bilhar's guilty plea as conclusively establishing that Bilhar: (1) knowingly submitted or caused to be submitted to the government a false or fraudulent claim; (2) knowingly made or used, or caused another to make or use, a false or fraudulent record or statement to get the government to pay its claim; and (3) conspired with one or more persons—at least one of whom performed an act to effect the conspiracy's object—to get a false or fraudulent claim allowed or paid by the U. S. (*See* Mem. Op. & Order of Mar. 14, 2007 [713] at 5-6; Verdict Form [858] at 2, 3, 4, 6, 7).

Next, "it is necessary to examine the issues [Bilhar] necessarily admitted by pleading guilty." *Alsco-Harvard Fraud Litig.*, 523 F. Supp. at 802. As Bilhar concedes, (Motion Six at 2- 4), its plea embraces the bare elements of a Sherman Act conspiracy, *McCarthy v. United States*, 394 U.S. 459, 466 (1968) (guilty plea is an admission of all elements of the charge). These elements are: "(1) the conspiracy charged was formed, and it was in existence at or about the time alleged; (2) the defendant knowingly formed or participated in that conspiracy; and (3) the activity that was the object of the conspiracy was within the flow of, or substantially affected, interstate or foreign commerce." (Ex. B to Pl.'s Mot. [558] at 3.) Thus, by pleading guilty,

Bilhar conclusively established that it had knowingly entered into "a continuing agreement, understanding, and concert of action" to "rig the bids" on U.S. government-funded Contracts 20A, 29, and 07. (*Id.* at 4, 5.)

Construed in this narrow sense, Bilhar's plea establishes, at least, that it conspired with others to get a false or fraudulent claim allowed or paid by the United States: claims submitted to the government under any contract secured through a collusive conspiracy are, inevitably, false or fraudulent. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543-45 (1943) (characterizing claims submitted under contract obtained through collusive bidding as "false" under the False Claims Act ("FCA")).[8]

For issue preclusion to have been proper, however, Bilhar's plea must also have established that claims *were actually submitted* pursuant to that conspiracy (which would also constitute the requisite overt act for FCA conspiracy). As this Court previously concluded in ruling on the government's original motion *in limine*, (Mem. Op. & Order of Mar. 14, 2007 [714] at 5-6), and on Bilhar's motion for reconsideration, (Mem. Op. & Order of Mar. 20, 2007 [738] at 1-2), it did.

Bilhar's guilty plea extends to the essential elements of a Sherman Act conspiracy, but its reach does not end there. Federal Rule of Criminal Procedure 11(f) mandates that before entering judgment on a guilty

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[8] *See also Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787-88 (4th Cir. 1999) (collecting cases in which FCA liability was imposed for claims submitted under contracts originally obtained through false statements or fraudulent conduct); *United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F. Supp. 292, 298 (D.D.C. 1996) (Harris, J.) (stating that if defendant obtained government contract fraudulently, as complaint alleged, "then all claims submitted under the contract are fraudulent").

plea, a court must "mak[e] such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f). Because the court may not enter judgment without this factual basis, there is good reason to give preclusive effect to factual admissions made in Rule 11 proceedings. Though he avoids a contested trial, "a defendant who pleads guilty does not save the court as much work as does a party who"—for example—"stipulates to the truth of a fact in a civil trial." *Otherson*, 711 F.2d at 275 n.8. Moreover, because the court must conduct a Rule 11 inquiry, "the facts underlying a guilty plea are more reliable than those established only by stipulation."[9]

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[9] The defendant's overt acknowledgment or validation of these facts adds to their reliability. In *International Telecommunications Satellite Organization v. Colino*, No. 88-1266, 1992 U.S. Dist. LEXIS 4887 (D.D.C. Apr. 15, 1992) (Lamberth, J.), the defendant had pleaded guilty to interstate transportation of money taken by fraud, and after reviewing the factual proffer filed in connection with the charges, he specifically admitted to certain facts contained therein. 1992 U.S. Dist. LEXIS 4887, at *19. In a subsequent civil suit brought by the victim, this Court held Colino could not deny "the facts supporting his conviction as they [were] contained in the factual proffer *reviewed and accepted by him*." *Id.* (emphasis added).

Similarly, where a defendant meticulously edited his indictment before pleading guilty to selected portions, the Second Circuit Court of Appeals concluded his plea's collateral estoppel effect could extend to those facts alleged in the indictment. *United States v. Podell*, 572 F.2d 31, 36 (2d Cir. 1978). The court explained:

> Podell carefully struck the portions of the indictment to which he did not desire to plead guilty, even deleting language in the crucial paragraph in this case - paragraph 5(c) of Count One. We conclude that by exhibiting such painstaking care to remove particular language from Paragraph 5(c), Podell in effect and, indeed, in actuality, admitted the

Id. Disincentives to litigate other than the truth of every fact alleged in an indictment may impact a defendant's decision to plead guilty. *See Haring v. Prosise*, 462 U.S. 306, 318-19 (1983) (describing possible pragmatic motivations for defendant's guilty plea). But as the Eleventh Circuit has observed, "[a] federal criminal defendant wishing to avoid both a trial and any collateral estoppel effects may ask for court permission to plead *nolo contendere*." *In re Raiford*, 695 F.2d 521, 523 (11th Cir. 1983). Moreover, a defendant may choose to plead only to particular portions of an indictment, thus limiting his plea's potential preclusive effect. *See, e.g. United States v. Podell*, 572 F.2d 31, 36 (2d Cir. 1978).

These considerations suggest that factual admissions in a Rule 11 proceeding may broaden a guilty plea's preclusive effect beyond the mere abstract elements of the crime charged.[10] Indeed, various other courts have approved the extension of pleas' collateral estoppel effects to defendants' accompanying factual admissions. *See, e.g., DeCavalcante v. Commissioner*, 620 F.2d 23, 24, 26, 28 & n.10 (3d Cir. 1980) (approving Tax Court's holding that defendant who had pleaded guilty to conspiracy to operate an illegal gambling enterprise could not deny connection with

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> truth of the remainder of the paragraph's allegations . . . . This conclusion is bolstered by Podell's statement in open court during the guilty plea allocution that he was pleading guilty to the selected portions of the indictment.

Id. at 36 & n.11.

[10] *Cf. Alsco-Harvard Fraud Litig.*, 523 F. Supp. at 804 (holding U.S. could not use defendants' general conspiracy plea "as a catch-all for conclusively establishing the specific manner by which that conspiracy was effectuated, even though a recital of the alleged scheme [was] included in . . . the indictment").

gambling activities admitted during Rule 11 hearing); *United State , v. Electro-Therapeutics, Inc.*, No. 94 Civ. 4008, 1996 U.S. Dist. LEXIS 2563, at *7-9 (S.D.N.Y. Mar. 6, 1996) (precluding defendant who pleaded guilty under general conspiracy statute from denying overt acts admitted during plea proceedings).[11]

In one such case, the defendants, who managed a home health services company, had pleaded guilty to conspiracy to commit health care fraud and mail fraud based on their submission of reimbursement claims to Medicare for personal expenses. *United States v. Szilvagyi*, 398 F. Supp. 2d 842, 844, 848 (E.D. Mich. 2005). In a subsequent FCA action, the U.S. sought damages from the same defendants for "knowingly present[ing], or caus[ing] to be presented, . . . a false or fraudulent claim for payment or approval" by the United States.[12] *Id.* at 844; 31 U.S.C. § 3129(a)(1)

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[11] Judge Green followed an analogous approach in giving preclusive effect to a jury verdict in *United States v. Uzzell*. There, a jury had convicted the defendants of criminal conspiracy to defraud the United States, which required an overt act. *See* 648 F. Supp. at 1365. In a subsequent FCA action, the United States sought to preclude the defendants from contesting their liability based on four of the thirty-nine overt acts alleged in the indictment count on which they had been convicted. *Id.* at 1363, 1364. The defendants argued that the jury may have premised its verdict on only one of those overt acts. *Id.* at 1365. But after "examin[ing] the record to determine exactly what was decided in the criminal proceeding," Judge Green found "nothing . . . indicate[d] that anything less than all of the specific acts alleged in the count were determined by the jury in reaching [its] verdict." *Id.* at 1364, 1365. She thus held the conviction conclusively established the defendants had committed all thirty-nine acts, including the four which comprised FCA violations. *See id.* at 1366.

[12] The government's complaint also alleged a conspiracy under 31 U.S.C. section 3129(a)(3), and the *Szilvagyi* court

(2008). During the plea colloquy, both defendants had "admitted, as part of the factual basis of their guilty pleas, that they intended for the cost reports [they had] submitted to Medicare to contain illegitimate costs for the construction of their home." 398 F. Supp. 2d at 849. "Since they intended the false claims to be submitted," section 3729(a)(1)'s scienter element was satisfied, and the court estopped them from denying liability. *Id.*

Here, in the Rule 11 memorandum accompanying its plea agreement, Bilhar acknowledged that it "and its co-conspirators did those things that they . . . conspired to do"—most saliently, that bids were submitted on Contracts 20A, 29, and 07 "pursuant to the terms of the bid-rigging conspiracy" and that the co-conspirators thereafter performed the contracts. [13] (Ex. B to Pl.'s Mot. [558] at 5.) As Bilhar rightly points out, a Sherman Act conspiracy need not involve an overt act. (Motion Six at 4 (citing *Nash v. United States*, 229 U.S. 373 (1913)).) Yet the overt acts Bilhar admitted in the Rule 11 memorandum

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found the plea to health care and mail fraud conspiracy necessarily embraced the elements of this claim. *See* 398 F. Supp. 2d at 848.

[13] Bilhar may not avoid collateral estoppel by claiming the memorandum "does not specifically state . . . that Bilhar itself committed any particular one of the listed acts." (Reply Six at 9.) Under the civil counterpart to the venerable *Pinkerton* rule,

> once [a] conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable . . . so long as the purpose . . . was to advance the overall object of the conspiracy.

Halberstam v. Welch, 705 F.2d 472, 481 (D.C. Cir. 1983).

were nonetheless "essential to [its] plea" because they supplied a factual basis, without which the criminal court, under Rule 11, could not accept Bilhar's plea.[14]

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[14] Equitable principles lend further support to this conclusion:

> Where a party assumes a certain legal position in a proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, 689 (1895).

This equitable doctrine, judicial estoppel, does not automatically apply to facts admitted in a guilty plea colloquy. *Thore v. Howe*, 466 F.3d 173, 185 (1st Cir. 2006). Rather, courts may invoke judicial estoppel at their discretion. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). *See also Thore*, 466 F.3d at 187 (after reviewing for abuse of discretion, affirming district court's application of judicial estoppel based on defendant's statements at the time he pleaded guilty).

Considerations relevant to this exercise of discretion include: (1) whether the party's present position is clearly inconsistent with its previous position; (2) whether the party "succeeded in persuading a court to accept the party's earlier position"; and (3) whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 750-51.

Here, in entering its guilty plea, Bilhar acknowledged that it and/or its co-conspirators had performed specific, overt acts in furtherance of the bid-rigging conspiracy. (See Ex. B to Pl.'s Mot. [558] at 5.) First, if permitted to contest liability in the False Claims case, Bilhar would (presumably) have adopted a contrary stance: in essence, though it had agreed with others to rig bids on Contracts 20A, 29, and 07, nothing had come of this pact. Such a position would be "clearly inconsistent with" its admissions in the Rule 11 memorandum. See 532 U.S. at 750.

Second, in accepting Bilhar's guilty plea, to fulfill its duties under Rule 11, the criminal court must have relied on Bilhar's

Hence, the Court did not err in precluding Bilhar from contesting its liability for conspiracy and on Contracts 20A and 29.

2. Admission of Bilhar's Guilty Plea

Under our Federal Rules of Evidence, relevance is a threshold requirement for admissibility—evidence must have some tendency to make the existence of any material fact either more or less probable. Fed. R. Evid. 401, 402. Even relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Defendants contend that Bilhar's plea agreement and Rule 11 memorandum lacked any probative value—as to Bilhar or any other defendant—or alternatively, that the danger of unfair prejudice substantially outweighed any probative value these documents might have had. (*See* Motion Five at 6-10; Motion Eight at 5-9.) Both arguments fail.

First, although Bilhar's liability had been conclusively established, it remained free to contest causation and damages. (Mem. Op. & Order of Mar. 14, 2007

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representations; thus, Bilhar "succeeded in persuading [that] court to accept [its] earlier position." *See id.*

Third and finally, if not estopped from assuming a contrary position here, Bilhar would have imposed a significant and unfair detriment on the opposing party. *See id.* at 751. Under the plea agreement, Bilhar negotiated a fine in a specified amount, payable over time in installments rather than in one lump sum, and received assurances of non-prosecution for itself and its corporate affiliates as well as their current and former directors, officers, and employees. (*See* Ex. A to Pl.'s Mot. [558] at 5-6, 10-14.) Having reaped these benefits from its factual admissions, Bilhar may not, now, force the government to expend the considerable time and resources that would be required to litigate the very same facts Bilhar has already acknowledged.

[713] at 6.) The plea agreement and Rule 11 memorandum had "probative value over and beyond the preclusive effect" given to the underlying plea, (Mem. Op. & Order of Mar. 20, 2007 [738] at 2), in that they tended to show how Bilhar and its co-conspirators pursued and accomplished their objectives.[15] These factual details were relevant to whether Bilhar caused damages to the United States. For example, the Rule 11 memorandum states that the conspirators met and agreed "to increase the price level of bids on USAID-funded Contracts 20A, 29, and 07." (Ex. B to Pl.'s Mot. [558] at 5.) While not conclusive, this statement tends to make it more likely that the United States paid more on these contracts than it otherwise would have, absent any collusion—a decidedly material issue.

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[15] BHIC and HUK cite several cases for the proposition that because Bilhar could not contest its liability, these documents lacked any evidentiary value as to Bilhar. (Motion Eight at 5.) Yet these authorities in no way establish that evidence relevant to material, contested issues should be excluded merely because it conclusively establishes other issues. *See Siclades v. Hartford Cas. Ins. Co.*, 94 Fed. Appx. 882, 883 (3d Cir. 2004) (where plaintiffs were estopped from seeking consequential damages, evidence of such damages was "irrelevant because [plaintiffs] would not be permitted under the law to recover them"); *United States v. United States Currency in Amount of $228,536.00*, 895 F.2d 908, 913, 920-21 (2d Cir. 1990) (where defendant was estopped from arguing property was seized in violation of the Fourth Amendment, testimony barely material to the existence of probable cause would be irrelevant in subsequent civil forfeiture proceeding); *Sherrock Bros. v. DaimlerChrysler Motors Co. LLC*, 465 F. Supp. 2d 384, 387, 391, 394 (M.D. Pa. 2006) (where plaintiff was estopped from bringing *ultra vires* and bad faith claims because state courts had fully adjudicated them, evidentiary hearing on these very issues "would [] be meaningless").

Even more rudimentary logic demonstrates these documents' probative value as to the other defendants' liability. To meet its burden as to the conspiracy charge, the government had to prove by a preponderance of the evidence that, *inter alia*, a conspiracy to get a false or fraudulent claim allowed or paid by the U.S. existed, and these defendants were participants therein. *See* 31 U.S.C. § 3129(a)(3) (2008). The facts recited in the plea agreement and Rule 11 memorandum tend to prove that a conspiracy of the type alleged by the government existed.[16] Hence, they held significant probative value as to Bilhar's co-defendants.

Second, any danger of unfair prejudice these documents may have posed to these co-defendants[17] was substantially diminished by their redaction and by the limiting instructions given to the jury both immediately after the documents were introduced into evidence,[18] (Apr. 10, 2007 PM Tr. at 100), and

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[16] *Cf. United States v. Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980) (mere *fact* of co-defendant's conviction, alone, was irrelevant to defendant's guilt).

[17] Defendants do not explain how these documents could be unfairly prejudicial to Bilhar, and it is not immediately obvious to the Court. The facts recited in the plea agreement and Rule 11 memorandum were certainly persuasive evidence, but particularly due to these documents' nature, it would not be *unfair* for the jury to assign great weight to Bilhar's voluntary admissions.

[18] Defendants also take issue with the timing of the Court's limiting instruction, insisting it should have been given immediately when plaintiffs' counsel mentioned Bilhar's conviction during his opening statement. (Motion Eight at 8.) Opening statements, however, are not evidence—as the jury in this case was instructed. (Mar. 20, 2007 AM Tr. at 25.) This Court gave a limiting instruction when the plea agreement and Rule 11 memorandum were actually placed in evidence. (Apr. 10, 2007 PM Tr. at 100.) Defendants offer no authority for their conten-

again in the Court's final instructions, (May 4, 2007 AM Tr. at 44-45).

As this Court acknowledged in its original ruling on this issue, the plea agreement and Rule 11 memorandum "pose[d] certain problems"—"[w]ithout guidance, the jury could become confused and assume that unrelated references in those documents to defendants in this case must mean that they were the

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tion that instructions limiting a jury's use of evidence should be read three weeks in advance of that evidence's introduction.

Relatedly, HC and HII misconstrue this Court's pre-trial rulings as establishing a "step-by-step" procedure under which evidence of Bilhar's prior criminal proceeding would be admissible against them only if they challenged the voluntariness of its plea. (*See* Motion Five at 4, 6.) BHIC and HUK apparently share this misconception. (See Motion Eight at 8 n.2.) Consequently, they protest plaintiffs' counsel's reference to these proceedings in his opening statement as unfairly prejudicial. As the Court clarified in denying defendants' motions for reconsideration, the guilty plea and Rule 11 memorandum were admissible. (Mem. Op. & Order of Mar. 20, 2007 [738] at 2.) It is hardly unusual for counsel to preview admissible evidence he intends to present during his case-in-chief in an opening statement. Furthermore, defendants' present complaints ring hollow: Bilhar's counsel also discussed the prior criminal proceeding in his opening statement—at far greater length and in much deeper detail than the government's counsel—without drawing an objection from any other defendant. (See Mar. 20, 2007 PM Tr. at 32-34.)

Finally, HII also decries government counsel's "transparent strategem to tar HII with the Bilhar guilty plea" by discussing the government's theory of liability for HII immediately following his reference to Bilhar's guilty plea. (Motion Five at 4.) Beneath this rhetorical gloss, however, the Court perceives no error. Government counsel simply urged the jury to hold HII accountable for its own conduct and not to absolve HII simply because another defendant had admitted guilt. (*See* Mar. 20, 2007 AM Tr. at 57 (citing HII's signing contracts and making representations to the U.S. government).)

others with whom Bilhar conspired"—and accordingly, all reference to these defendants was redacted before the documents' admission. (Mem. Op. & Order of Mar. 16, 2007 [722] at 3.) Nonetheless, defendants contend the documents' generic references to "co-conspirators" and their "conspicuous redactions" spawned the same confusion.[19] (Motion Five at 9; Motion Eight at 8.) The identified language could have occasioned no prejudice.[20] Even absent any reference to "co-conspirators" in the documents, a reasonable juror—particularly one instructed on the definition of conspiracy, as the jury was here—would assume that Bilhar could not have entered into the pleaded conspiracy alone.

Yet defendants insist the jury must have "substitute[d] the prior criminal proceeding for its own judgment of the facts." (Motion Six at 9.) Introduction of another fact-finder's conclusions may create a risk that the jury will abdicate its duty to make an independent appraisal, but the gravity of this risk depends on the surrounding circumstances.[21]

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[19] HII and HC protest the Court's ruling they could not inform the jury that no criminal charges had been filed against them. (Motion Five at 9 n.2.) But having been informed that Bilhar had faced criminal charges, and having heard nothing similar as to the other defendants, the jurors might well have inferred no other defendant among those present had been charged. This inference was surely as reasonable as the competing, allegedly prejudicial, inference that *these* defendants must have been Bilhar's co-conspirators.

[20] Defendants somewhat melodramatically characterize the Rule 11 memorandum as "fraught with criminal words," but it is by no means surprising or unduly prejudicial that "criminal words" should appear in records of a *criminal* conviction.

[21] *See, e.g., Gil-De-Rebollo v. Miami Heat Ass'ns, Inc.*, 137 F.3d 56, 64 (1st Cir. 1998) (declaring in personal injury suit that

Moreover, this Court places greater faith in the presumption—elemental to our justice system—that a properly instructed jury will follow the law.[22] Here, this Court twice instructed the jury as follows:

> The fact that Bilhar pleaded guilty may not in any respect be considered against any other defendants, nor may any inference be drawn against them by reason of Bilhar's plea of guilty. The guilty plea was the personal plea of [Bilhar] and was binding only upon it. Guilt is personal. The verdict as to each defendant before you must be considered separately with respect to that defendant solely upon the evidence against that defendant or the lack of such evidence.

(Apr. 10, 2007 PM Tr. at 100; May 4, 2007 AM Tr. at 44-45.) In light of the thorough precautionary measures undertaken here, the Court concludes any danger of unfair prejudice was effectively mitigated[23]

"[u]nder the circumstances, admission of [defendant's] criminal conviction would have allowed the jury to substitute the judgment reached in the criminal proceeding for its own," where circumstances included: (1) "jurors were presented with sufficient evidence to gauge the seriousness of [defendant's] actions and their effect on the plaintiff"; (2) "[i]n addition to the testimony of the plaintiff and other witnesses, the episode was recorded by a television camera and the tape was made available for the jury to watch"; and (3) the jury therefore "did not need evidence of [defendant's] criminal conviction to assess his role in the incident").

[22] *See, e.g., Richardson*, 481 U.S. at 206. *See also United States v. Boone*, 437 F.3d 829, 838 (8th Cir. 2006) ("Where multiple defendants are tried together, the risk of undue prejudice is best cured through cautionary instructions to the jury . . . .").

[23] None of the precedents to which defendants direct the Court's attention suggests—let alone, compels—a contrary conclusion. *See United States v. Berkery*, 889 F.2d 1281 (3d Cir. 1989) (ordering new trial on all counts where trial court erro-

and did not substantially outweigh the documents' high probative value.

The plea agreement and Rule 11 memorandum were also hearsay, however, and even relevant hearsay evidence is inadmissible. Fed. R. Evid. 802. As in other areas of the law, myriad exceptions to this general rule exist, and this Court originally admitted these hearsay documents under one such exception, codified in Federal Rule of Evidence 803(22). (Mem. Op. & Order of Mar. 16, 2007 [722] at 3.) Defendants now attack this ruling on three, interrelated grounds.

First, they insist that one defendant's guilty plea may never be admitted against co-defendants in a subsequent civil trial. (Motion Five at 7-8; Reply Five at 6-7.) Yet Rule 803(22) itself expressly contemplates this scenario: it expressly does not reach "judgments against persons other than the accused," but *only* when they are "offered by the Government in a criminal prosecution for purposes other than impeachment." Fed. R. Evid. 803(22). Defendants' reading of the Rule entirely ignores this qualifying clause.

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neously required that sole defendant admit to conspiracy charge to qualify for entrapment instruction, even though court had admonished jury that defendant had not admitted related, "closely intertwined" substantive charges); *Warner v. Rossignol*, 538 F.2d 910 (1st Cir. 1976) (ordering new trial on damages despite brief curative instruction where "plaintiff's attorney persisted in going beyond the pleadings and the evidence, embroidering upon plaintiff's head injuries and the (completely speculative) consequences which might flow from those injuries . . . even after repeated warnings from the judge and in a manner . . . calculated to inflame the jury"); *Beck v. Wings Field, Inc.*, 122 F. 2d 114 (3d Cir. 1941) (ordering new trial despite curative instruction where plane crash plaintiff's expert witness testified he had personally experienced identical plane crash due to same "ditch" on defendant's runway).

Moreover, various precedents support the admission of co-defendants' guilty pleas against civil defendants. *See, e.g., Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995) (one defendant's plea agreement was admissible under Rule 803(22) and established other defendants' liability); *Guillermety v. Gonzalez*, 491 F. Supp. 2d 199, 201 (D.P.R. 2006) (one defendant's guilty plea was admissible under Rule 803(22) to establish all defendants' liability).[24]

Second, defendants observe that Rule 803 (22) permits introduction of a guilty plea only "to prove [] fact[s] essential to sustain the judgment," Fed. R. Evid. 803(22), and they suggest that Bilhar's admissions in the plea documents exceeded this scope.[25] (*See* Motion Eight at 6; Reply Eight at 2.) As explained above, however, because Federal Rule of Criminal Procedure 11 demands that a court assure itself of a factual basis for any guilty plea, Fed. R. Crim. P. 11(f), the admissions in these documents were essential to Bilhar's plea.[26] *See supra* part II.A.1.

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[24] In fact, courts have even admitted *non-parties'* guilty pleas against civil defendants. *See, e.g., RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 401, 403 (8th Cir. 1995) (non-party employee's guilty plea and accompanying sworn statement were admissible against defendant employer in subsequent civil case); *Newby v. Enron Corp.*, 491 F. Supp. 2d 690, 703 (S.D. Tex. 2007) (non-party's guilty plea was admissible against defendants in subsequent civil case).

[25] Defendants' only authority for this proposition is an unpublished disposition from this Circuit. (See Motion Eight at 6 (citing *Lemire v. Comm'r of Internal Revenue*, 901 F. 2d 1130 (D.C. Cir. 1990).) In accordance with the Court of Appeals' instructions, however, the Court declines to rely on it as precedent. D.C. Cir. R. 32.1, 36.

[26] *Cf. Columbia Plaza Corp. v. Security Nat'l Bank*, 676 F.2d 780, 789-90 (D.C. Cir. 1982) (where jury returned general con-

Third and finally, citing the Advisory Committee's Note, defendants contend that Rule 803(22) provides for two, incompatible alternatives: a court may give preclusive effect to a prior conviction, *or* it may admit evidence of that conviction "for what it is worth." (Motion Eight at 6-7; Reply Eight at 2-3; Reply Five at 6.) If the former, defendants argue, then the evidence becomes devoid of probative value and consequently inadmissible. (Motion Eight at 6.) Assuming, without deciding, that defendants have accurately interpreted the Note, giving preclusive effect to Bilhar's guilty plea would only render the plea documents irrelevant to *Bilhar's liability*. It would in no way diminish their probative value—discussed above—as to the *other defendants'* liability. And even if the Court erred in admitting the documents against Bilhar under Rule 803(22), they were nonetheless admissible against Bilhar as non-hearsay under Rule 801(d)(2)(A).[27]

Accordingly, the Court concludes its admission of Bilhar's plea documents was proper.

B. Hearsay Testimony

Defendants next take issue with the Court's admission of certain testimony under Federal Rule of Evidence 801(d)(2)(E) and *United States v. Gewin*,

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spiracy verdict, trial court properly determined no overt act *charged in indictments* was "essential" to sustain the verdict and thus correctly excluded indictments as inadmissible under Rule 803(22)).

[27] Defendants cite abundant authority for the proposition, evident on the Rule's face, that party admissions are non-hearsay only when offered against the speaker—in this case, Bilhar. (See Motion Eight at 7.) The Court did not, and does not, propose to hold otherwise.

471 F.3d 197 (D.C. Cir. 2006).[28] (See Mem. Op. & Order of Apr. 27, 2007 [821] at 1-2.) They contend this testimony was inadmissible hearsay because the statements were not made in furtherance of a conspiracy or joint venture .[29] (Motion Five at 21-23.)

1. Richard Miller

First, defendants point to several statements by relator Richard Miller. (Motion Five at 22.) Miller testified that in 1990, after a meeting in Cairo on Contract 20A, John Ollis told him of a conversation with defendant Anderson, in which Anderson "told him that every U.S. contractor that was prequalified to do USAID work in Cairo was a member of a club that had been set up and met in Frankfurt to essentially setup or rig the bids." (Mar. 28, 2007 PM Tr. at 90-91, 102-03.) Defendants challenge only the second level in this double hearsay statement, Ollis's statement to Miller. (Motion Five at 22.) Yet because plaintiffs did not offer this statement for its truth, but rather for its effect on the hearer—Ollis's statement explained Miller's motivation for raising

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[28] The Rule exempts statements of a party's co-conspirators during the course and in furtherance of the conspiracy, when they are offered against the party. Fed. R. Evid. 801(d)(2)(E). *Gewin* extends the exception to joint venturers' statements during and in furtherance of the joint venture. 471 F.3d at 201-02.

[29] Defendants raise two additional points with which the Court may easily dispose. First, they contend *Gewin* "is contrary to the plain language of Rule 801(d)(2)(E) and Supreme Court precedent." (Motion Five at 20.) Whatever else it may be, however, *Gewin* is binding precedent to which this Court must adhere. Second, HC insists it was never a joint venturer, so even if the identified statements were admissible under 801(d)(2)(E) against the other defendants, they would nevertheless be inadmissible against HC. (Motion Five at 23.) For the reasons explained herein, any error was harmless.

concerns about the 20A project to his superiors at J.A. Jones, (Mar. 28, 2007 PM Tr. at 103-05)—it was not hearsay, see Fed. R. Evid. 801(c). Moreover, given that Ollis had related Anderson's statement directly to the jury the previous day, (Mar. 27, 2007 PM Tr. at 41-42), Miller's repetition of the statement could hardly have prejudiced the defendants.

Miller also testified to statements by Jones President Charles Davidson. (Mar. 28, 2007 PM Tr. at 104-05.) After Miller shared what Ollis had told him in Cairo, Davidson advised Miller that he would inform Johnie Jones, CEO of parent company J.A. Jones, Inc. (*Id.*) Defendants insist this statement advanced only Jones's interests, not those of the joint venture,[30] (Reply Five at 11-12), but this myopic argument ignores the obvious benefit the joint venture would derive from uncovering any illegality among its activities. Miller and Davidson were then unaware whether and to what extent Anderson's statement might be true, and if it were, who in the joint venture partners' corporate hierarchies might be in on the scheme. By warning one partner's CEO that some illegality might be afoot, Davidson would help to ensure that joint venture decision-makers could evaluate, and if necessary, act on, this potentially damaging information. *Cf. United States v. Walls*, 70 F.3d 1323, 1327 (D.C. Cir. 1995) (warning that another co-conspirator could not be trusted furthered the conspiracy's objectives). By sharing his intent to

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[30] Defendants further argue that Davidson's suggestion "that Miller and Ollis tell their wives what happened . . . in no way advanced any Joint Venture interests or any conspiracy." (Motion Five at 22.) Yet they do not explain, and the Court cannot surmise, how so mundane a statement's admission could be so irreparably prejudicial as to warrant a new trial.

do so with Miller, he kept another joint venturer informed. *See United States v. Snider*, 720 F.2d 985, 993 (8th Cir. 1983) (statements ensuring co-conspirator's "informed participation" advanced the conspiracy). Moreover, even had Davidson's statement *not* been made in furtherance of the joint venture, defendants do not explain how its admission prejudiced them.[31] (*See* Reply Five at 10-11.)

Finally, defendants assert that Miller testified to statements by Fritz Biesecker in authenticating Plaintiffs' Exhibit 202. (Motion Five at 22.) Miller stated that he initially learned of this document when Biesecker showed it to him, and that Biesecker "discussed" it with him. (Mar. 29, 2007 AM Tr. at 45-46.) But contrary to defendants' assertion, (Reply Five at 12), it is *not* clear which of Miller's statements concerning the document, if any, simply parroted Biesecker, and defendants make no effort to distinguish among them. Hence, the Court cannot conclude these statements were inadmissible hearsay.

2. John Ollis

Second, defendants challenge certain statements related by John Ollis during his testimony. (Motion Five at 22-23.) They first cite Davidson's advice to Ollis and Miller that they retain personal attorneys, (Mar. 27, 2007 PM Tr. at 50-51), which plaintiffs

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[31] It also appears to the Court that Davidson's statement would have been admissible under Rule 803(3), which excepts statements of intention from the hearsay bar. Fed. R. Evid. 803(3) & Advisory Committee's Note. *See also Mutual Life Ins. Co. v. Hillman*, 145 U.S. 285 (1892) (admitting statement of intention to prove the act intended in fact occurred). Plaintiffs do not specifically articulate this ground in their brief, however, so the Court will not address it.

claim was offered merely for its effect on the listeners, "who subsequently sought legal counsel," (Opposition Five at 19). Yet Ollis testified he consulted private counsel a full six to eight months later, a delay that belies plaintiffs' argument. (Mar. 27, 2007 PM Tr. at 54-55.) Plaintiffs' perfunctory assertion that this statement falls within 801(d)(2)(E)'s exemption likewise fails, as they do not explain how advice that Ollis and Miller seek *personal* legal counsel would further the joint venture's interests. (*See* Opposition Five at 19.) Nonetheless, considered in context, this statement's admission did not comprise "a clear miscarriage of justice" that would prompt this Court to order a new trial. *See Wild v. Alster*, 377 F. Supp. 2d 186, 189 (D.D.C. 2005) (Walton, J.). Ollis testified only that during a meeting after Anderson's Cairo disclosure, Davidson proposed that Miller and Ollis seek legal advice, "[b]ecause of possible legal implication[s]." (Mar. 27, 2007 PM Tr. at 50-51.) The jury may have interpreted this statement as reflecting consciousness of wrongdoing. But Ollis's next comments—that Davidson also asked him to brief a Jones corporate attorney, to whom Ollis related his conversation with Anderson, and who then conducted an investigation, (*id.* at 51-54)—thoroughly eclipsed his earlier statement in terms of prejudicial effect and value to plaintiffs' case. Hence, while its admission may have been error, a new trial is unwarranted.

Ollis also related a double hearsay statement: Manfred Pietchottka told Ollis he had overheard Gunter Niebergall speaking to an unknown listener over the telephone. (Mar. 27, 2007 PM Tr. at 60-61.) The second link in this chain—from Pietchottka to Ollis—falls under Rule 801(d)(2)(E). Pietchottka, a Jones employee, repeated Niebergall's statements about paying other contractors to refrain from bidding

in response to his supervisor's (Ollis) query about a large and seemingly inexplicable payment to Holzmann. (*Id.* at 57-62.) This statement advanced the joint venture's interests in that Pietchottka—a joint venture partner employee—provided his boss with "important background information" that Ollis requested while "carry[ing] out his duties" as Vice President of one joint venture partner. *See United States v. Tarantino*, 846 F.2d 1384, 1413 (D.C. Cir. 1988).

The first link is more problematic. Because plaintiffs cannot identify the person to whom Niebergall spoke, defendants contend his statements cannot possibly have been in furtherance of the bid-rigging conspiracy.[32] (Reply Five at 12-13.) This threshold admissibility issue was one for the Court to determine by a preponderance of the evidence, *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), and several elements of Ollis's testimony convince it that plaintiffs met their burden. First, Pietchottka indicated that he heard Niebergall, a Holzmann employee, "talking to one of the other contractors" about a payment for not bidding on a contract. (Mar. 27, 2007 PM Tr. at 62.) Given plaintiffs' other evidence that the instant bid-rigging conspiracy involved such payments among construction contractors, it would be reasonable to infer that Niebergall was speaking to a co-conspirator about a promised payment. A second fact bolsters this inference: Pietchottka told Ollis that the conversation escalated into a "heated argument." (*Id.*) Finally, Niebergall ultimately directed the other

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[32] Defendants do not appear to dispute the other required elements of Rule 801(d)(2)(E)—that Niebergall, a Holzmann employee, was a co-conspirator, and that the bid-rigging conspiracy was then ongoing. *See* Fed. R. Evid. 801(d)(2)(E).

party to talk to "PS," or Pieter Schmidt,. (*Id.*) That Niebergall referred the other party to Schmidt, a pivotal figure in the overall conspiracy, and that the other party was familiar enough with Schmidt to associate these initials specifically with him, further suggest the mystery caller was a fellow conspirator. Thus, it appears more likely than not Niebergall's statements to the unknown caller were made in furtherance of the conspiracy. Accordingly, having reevaluated Ollis's statements' admissibility, the Court again concludes they were non-hearsay under Rule 801(d)(2)(E).

Finally, Ollis repeated Niebergall's statement that "he could bid the work for [Jones] in Egypt, because he knew all the prices before they were submitted." (Mar. 27, 2007 PM Tr. at 63.) Defendants characterize Niebergall's statement as "spilling the beans" and therefore outside the scope of Rule 801(d)(2)(E). (Motion Five at 22-23 (citing *City of Tuscaloosa v. Harcros Chews.*, 158 F.3d 548, 559 (11th Cir. 1998)).) Plaintiffs, however, insist "Niebergall was essentially attempting to recruit Ollis into the bid-rigging conspiracy by offering to handle Jones' bidding process for them," (Opposition Five at 20), which would have furthered the conspiracy's interests, *see City of Tuscaloosa*, 158 F.3d at 559. Considered in context, the latter reading is more plausible. At a dinner meeting between executives from Jones and Holzmann, during a discussion of Jones's international various projects, Niebergall, who represented Holzmann's International Division, offered to bid work for Jones on an international project.[33] (*See* Mar. 27, 2007 PM

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[33] Ollis testified: "At that time we were discussing our—the work that we had in various places in Holzmann. We were talking about their international work, because Linderman and

Tr. at 62, 63.) Rather than mere bragging or boasting,[34] Niebergall offered—at a business meeting between corporate executives—to share the bid-rigging conspiracy's benefits with Jones. Hence, the Court concludes this statement was intended to advance the conspiracy's objectives and was properly admitted under Rule 801(d)(2)(E).

3. Ernest Teal

Third, defendants protest Ernest Teal's relation of double hearsay. (Motion Five at 23; Motion Eight at 10.) Teal testified that Jurgen Schoenwasser told him Pieter Schmidt and Johnie Jones had ordered Schoenwasser to cancel a scheduled audit of Contract 20A. (Mar. 28, 2007 AM Tr. at 49.) As plaintiffs explain, (Opposition Five at 20 n.24), Schoenwasser's statement to Teal was not hearsay because plaintiffs offered it for its effect on Teal—to show why he did not audit Contract 20A. (Mar. 28, 2007 AM Tr. at 47-53.) And considering that Schmidt was a key player in the bid-rigging conspiracy, plaintiffs' proffered

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Niebergall were in their International Division, and that's when Niebergall told me that he could bid the work for us in Egypt, because he knew the prices before they were submitted." (Mar. 27, 2007 PM Tr. at 63.)

[34] Defendants suggest Niebergall was simply flaunting his inside knowledge, but in the cases they cite for this proposition, the declarants did not couch their boasts as express offers or invitations, such as Niebergall did here. *See Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1011-12 (6th Cir. 1999) (trial court did not clearly err in construing CEO's verbal denial that collusive agreement existed, combined with his non-verbal conduct, as mere boasting that such an agreement did exist); *United States v. Birnbaum*, 337 F.2d 490, 494-95 (2d Cir. 1964) (trial court erred in admitting co-conspirator's narrative of defendant's "past double-dealing" to another co-conspirator because it was not made in furtherance of the conspiracy).

explanation—that Schmidt and Jones ordered the audit cancelled "to conceal facts pertinent to the conspiracy and [] to the diversion of profits," (Opposition Five at 21)—is wholly reasonable.[35] Accordingly, Schmidt and Jones's directions to Schoenwasser were likewise non-hearsay (under Rule 801(d)(2)(E)), and the Court did not err in admitting Teal's testimony.

In sum, of defendants' myriad complaints concerning hearsay evidence, only one rings true. Ollis' recounting of Davidson's advice to Ollis and Miller that they retain personal attorneys, (Mar. 27, 2007 PM Tr. at 50-51), was not properly admissible either for its effect on the hearer or as a joint venturer's statement. Nonetheless, this statement's admission did not comprise "a clear miscarriage of justice" that would prompt this Court to order a new trial. *See Wild*, 377 F. Supp. 2d at 189.

C. McAfee Testimony

Over defendants' repeated and strenuous objections, this Court permitted Professor R. Preston McAfee to testify as an expert in the field of economics on plaintiffs' behalf. (Order of Apr. 4, 2007 [760]; Apr. 5, 2007 PM Tr. at 49, 58, 72-73.) Specifically, McAfee "was asked to explain how auctions and bidding work, how collusion in auctions work[s], and the incentives that are created for seeking cost-reducing technologies." (*Id.* at 75.) Defendants opposed—and still oppose—his testimony as an expert on these subjects. (See Motion Five at 37-44; Motion Eight at 18-25.)

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[35] As a preliminary matter, whether the statement was made in furtherance of the conspiracy was an issue for the Court to decide by a preponderance of the evidence. *Bourjaily*, 483 U.S. at 175.

Federal Rule of Evidence 702 principally governs admission of expert testimony. The party seeking to present the expert's testimony must convince the Court of its admissibility by a preponderance of the evidence. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 & n.10 (1993). In all instances, the proffered expert must be qualified "by knowledge, skill, experience, training, or education," and his testimony must be helpful to the trier of fact. Fed. R. Evid. 702. Generally, his testimony must be "based upon sufficient facts or data" and must also be "the product of reliable principles and methods," applied "reliably to the facts of the case." *Id.*

Evidently relying on this last phrase, defendants protest that McAfee's testimony was "completely unmoored from the facts of this case." (Motion Eight at 19.)[36] Yet courts routinely permit experts to "explain principles without applying them or offering an opinion on the ultimate issue." *See, e.g., Erickson v. Baxter Healthcare, Inc.*, 151 F. Supp. 2d 952, 968 (N.D. Ill. 2001).[37] As the Advisory Committee's Note to Rule 702 recognizes,

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[36] *See also* Motion Five at 38 ("Defendants' arguments were validated during *voir dire* of McAfee when he disavowed having any specific knowledge about the facts of the case."); Reply Eight at 14 ("plaintiffs were not entitled to shield McAfee's conclusions from scrutiny by blindfolding him and insulating him from any knowledge of the complex facts in this case").)

[37] *See also United States v. Mulder*, 273 F.3d 91, 102 (2d Cir. 2001) ("The government is free to offer expert testimony as background for an offense"); *Strauss Farms, Inc. v. Combs Commodities, Inc.*, No. 03-4046-RDR, 2005 U.S. Dist. LEXIS 6965, at *3-8 (D. Kan. Mar. 29, 2005) ("[it] is not a requirement of Rule 702, *Daubert*, or *Kuhmo*" that proffered expert's scientific knowledge be "specifically applied to the facts of this case").

> it might [] be important in some cases for an expert to educate the factfinder about general principles, *without ever attempting to apply these principles to the specific facts of the case* . . . . The [2000] amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.

Fed. R. Evid. 702 Advisory Committee's Note (emphasis added).[38] Thus, while an expert *may* base his opinion on "facts or data in the particular case . . . perceived by or made known to the expert at or before the hearing," he may alternatively rely on facts or data "of a type reasonably relied upon by experts in the particular field," whether admissible or not. Fed. R. Evid. 703. Hence, so long as McAfee's testimony

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[38] Defendants insist McAfee did not confine his testimony to "general principles" because he "offered conclusions regarding the 'direct costs' of 'cartel behavior.'" (Reply Eight at 14.) In particular, they take issue with his statements that a cartel bidder must "increase the price enough to account for all of the direct costs facing conspirators" and that such bidders face reduced incentives to discover cost-reducing technology prior to bidding. (Apr. 5, 2007 PM Tr. at 84-89, 103.) These statements simply described elements of the abstract cartel behavior model McAfee discussed throughout his testimony and did not exceed his purview as a "teaching witness." Defendants further complain that these supposed costs lack any basis in empirical analysis and thus comprise "nothing more than pure speculation" or "common sense in the guise of economic analysis." (Motion Eight at 23 & n.12.) While common sense dictates that those who engage in illegal collusion face a risk of getting caught, an economist looks at this risk differently: "it is part of every economic model that risks have costs . . . [and] bear a price." (Apr. 5, 2007 PM Tr. at 100.) McAfee made these risks and their role in pricing explicit, allowing the jurors to assess a cartel participant's bid selection as an economist would. His inability to cite an empirical study documenting these costs impacts the weight of this evidence, but not its admissibility.

satisfied Rule 702's other requirements, it was properly admitted regardless of whether he reviewed facts particular to this case or applied the economic principles he explicated to them.

When an expert testifies "to educate the factfinder on general principles,"[39] Rule 702 requires that: (1) the expert be qualified;[40] (2) the testimony address a

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[39] As examples of such general principles, the Advisory Committee's Note cites "the principles of thermodynamics, or bloodclotting, or [] how financial markets respond to corporate reports." Fed. R. Evid. 702 Advisory Committee's Note. Courts have admitted such generalized expert testimony to educate jurors on a wide variety of other subjects. *See, e.g., Mulder*, 273 F.3d at 101-02 (labor coalition behavior); *United States v. Locasio*, 6 F.3d 924, 936 (2d Cir. 1993) (structure and tactics of the Mafia); *Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc.*, No. C 03-1431 SBA, 2006 WL 1329999, at *4-5 (N.D. Cal. May 15, 2006) (cardiopulmonary bypass and hemodialysis procedures); *Strauss Farms, Inc.*, 2005 U.S. Dist. LEXIS 6965, at *3-8 (spontaneous combustion); *SEC v. Lipson*, 46 F. Supp. 2d 758, 767-68 (N.D. Ill. 1999) (accounting); *In re Eastern & S. Dist. Asbestos Litig.*, 772 F. Supp. 1380, 1386 (E. & S.D.N.Y. 1991) (asbestos and its side effects), *rev'd in part on other grounds by In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992).

[40] Defendants do not overtly challenge McAfee's qualifications, but BHIC and HUK do seem to raise this issue in their reply brief, contending that McAfee's lack of "specified expertise" in "extremely complex and risky international construction projects, the competition for which is severely limited by the requirements of the government entity that finances the projects" disqualifies him from testifying to cartel and auction behavior in this case. (Reply Eight at 14.) BHIC cites one case for this proposition. *See In re Air Disaster at Lockerbie Scot.*, 37 F.3d 804 (2d Cir. 1994). There, the Court of Appeals affirmed the trial court's exclusion of testimony from two "explosives officers with Scotland Yard who specialized in street bombings" for several reasons. *Id.* at 825.

subject matter on which the factfinder can be assisted by an expert; (3) the testimony "fit" the facts of the case, and (4) the testimony be reliable. Fed. R. Evid. 702 Advisory Committee's Note. The latter three criteria follow directly from the Supreme Court's landmark decision on Rule 702 in *Daubert*. There, the Court directed district courts evaluating proffered experts to conduct a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. This assessment's objective is two-pronged: it

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> Their testimony as to the importance of x-rays would have been cumulative since similar testimony was adduced from other witnesses. Additionally these witnesses' expertise as to x-rays [used by airline baggage screening equipment] was *questionable* . . . . Neither had experience in aviation bombings or security. Moreover, neither had any background or knowledge concerning the Flight 103 bombing itself.

Id. (emphasis added). By contrast, here, McAfee's testimony was not cumulative. Moreover, it is, indeed, questionable whether street bombing experts with no experience in aviation bombings or security would demonstrate expertise in x-ray equipment used in airline baggage screening. But BHIC does not explain why McAfee's model—which accounts for the impact on competition of "a qualification stage for potential suppliers," some of whom may be "already prequalified because they have bid on other matters," (Apr. 5, 2007 PM Tr. at 76)—is too generalized to apply to "extremely complex and risky international construction projects." The Court will not attempt to make this argument on BHIC's behalf. *See Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.").

"ensure[s] the reliability and relevancy of expert testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Consequently, reliability is among the Advisory Committee's four criteria. Fed. R. Evid. 702 Advisory Committee's Note. Its second criterion—"that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue'"—"goes primarily to relevance." *Daubert*, 509 U.S. at 591. And its third criterion, "fit," simply restates this relevancy consideration. *Id. See also United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1986) ("An additional consideration under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts . . . that it will aid the jury in resolving a factual dispute.").

1. Relevancy

Addressing the helpfulness requirement, defendants contend McAfee testified only "to matters of 'common sense,' which [are] not the proper subject of expert testimony." (Reply Eight at 12.) A review of his direct examination reveals that defendants have committed a frequent error of non-economists: confusing correlation with causation. McAfee's conclusions may, to some degree, have accorded with "common sense" notions, but this coincidence does not necessarily imply that his conclusions *derived* from "common sense." McAfee explained to the jury, *inter alia*, the U.S. federal government's standard procurement process, (Apr. 5, 2007 PM Tr. at 76-77), auction bidders' incentives to discover cost-reducing technology, both before and after bids are submitted, in competitive and collusive processes, (*id.* at 84-87, 93-94), and the typical equilibrium points for winning bids in oral and sealed-bid auctions, (*id.* at 104-06). These are

precisely the sort of specialized, technical matters concerning which a lay jury may benefit from a qualified expert's tutelage.[41] McAfee distilled complex economic concepts into language that would be comprehensible to the jury. While this may have enhanced his testimony's persuasive value, it did not render that testimony inadmissible.[42]

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[41] A survey of other decisions admitting or rejecting testimony by such "teaching witnesses" confirms that theoretical models of economic actors' behavior are appropriate fodder for expert testimony. *Compare* Fed. R. Evid. 702 Advisory Committee's Note (noting teaching expert testimony would be admissible on "how financial markets respond to corporate reports"), *Mulder*, 273 F.3d at 101-02 (admitting teaching expert testimony on labor coalition behavior), *Locasio*, 6 F.3d at 936 (admitting teaching expert testimony on structure and tactics of the Mafia), and *Lipson*, 46 F. Supp. 2d at 767-68 (admitting teaching expert testimony on accounting principles), *with United States v. Fredette*, 315 F.3d 1235, 1240 (10th Cir. 2003) (refusing to admit teaching expert testimony on operation of rebate programs); *United States v. Stevens*, 935 F.2d 1380, 1399 (3d Cir. 1991) (refusing to admit teaching expert testimony on tendency of clearly suggestive photo array to cause misidentification); *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1147 (4th Cir. 1986) (refusing to admit teaching expert testimony comparing credit union clerical employees' qualifications); *Green v. Kinney Shoe Corp.*, 715 F. Supp. 1122, 1124 (D.D.C. 1989) (Revercomb, J.) (refusing to admit teaching expert testimony on significance of defendant employer's use of subjective criteria in promoting employees), *and Robertson v. McCloskey*, 676 F. Supp. 351, 353-55 (D.D.C. 1988) (Green, J.) (refusing to admit teaching expert testimony on effect of time on memory quality).

[42] The Eleventh Circuit Court of Appeals' opinion in *City of Tuscaloosa v. Harcros Chemicals* illustrates the distinction between proper matters for expert testimony and "common sense" factual determinations that lie within the jury's exclusive province. *See* 158 F.3d at 564- 67. *City of Tuscaloosa* involved an alleged conspiracy among five chemical companies "to fix prices for repackaged chlorine in Alabama in violation of both federal

Continuing with the subject of relevancy, defendants offer several arguments which the Court construes as attacking McAfee's testimony's "fit" with the facts of this case. They focus predominantly on McAfee's reliance on a set of assumptions in articulating his model of cartel behavior. (Motion Five at 39, 41; Motion Eight at 19-21.)

As set forth in McAfee's testimony, several assumptions underpinned his analytic model: (1) the government procurement process begins with a need; (2) "there is a qualification stage for potential suppliers" of that need; (3) the government issues a sealed-bid tender, or request for supply, to the qualified bidders; (4) interested, qualified bidders respond by submitting sealed bids; and (5) the government "either picks the lowest priced supplier or [] negotiates with that supplier." (Apr. 5, 2007 PM Tr. at 76-77.) He then explained how, under this set of

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and state antitrust law." *Id.* at 553. Among other experts, the plaintiffs proffered statistician James McClave. *Id.* at 562. McClave's testimony concerning his "statistical measurements of events in the Alabama chlorine market during the period of the alleged conspiracy" was admissible, but his "assertions regarding the existence of a conspiracy, . . . his characterization of certain bids as 'signals' to co-conspirators[,] . . . and his characterizations of documentary evidence as reflective of collusion" were not. *Id.* at 565. As the Court of Appeals explained, "the trier of fact [was] entirely capable of determining whether or not to draw such conclusions without any technical assistance from McClave or other experts." *Id.*

Here, McAfee's discourse on cartel behavior and incentives aided the jurors in understanding how a cartel such as that alleged by plaintiffs might operate, in theory. But "the trier of fact [was] entirely capable of determining" whether the factual scenario sketched by plaintiffs' other witnesses comported with this theoretical model, and McAfee properly left this analysis to the jury. *See id.*

assumptions, a prospective bidder would select his bid price in a competitive auction, (*id.* at 78- 90), and how he would do so in a cartel situation, (*id.* at 90-104).

As defendants correctly point out, an expert may rely on assumptions, but those assumptions must be "based on fact." *Three Crown Ltd. P'ship v. Salomon Bros.*, 906 F. Supp. 876, 893-94 (S.D.N.Y. 1995) (excluding damages expert's testimony where he assumed, *inter alia*, that one of plaintiff's investment groups—"which, by its own admission, conducted highly leveraged discretionary trading which frequently had to be adjusted to keep pace with the rapidly changing market and that mandates ever evolving opportunities for profit and loss"—would have entered a particular future line of trades). *See also Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 569 (D.C. Cir. 1993) (holding damages expert's testimony should have been excluded where he assumed that decedent would have entered a wholly new line of work).

According to the defendants, "several of McAfee's key assumptions proved to be either demonstrably wrong or contrary to the testimonial record." (Motion Five at 41.) First, they cite his "assumption" that this case involved U.S. government procurement, explaining that Egyptian authorities managed the bidding on the contracts at issue here. (*Id.*) Yet the record reflects no such assumption. McAfee merely *analogized* the auctions in the instant case to the typical government procurement process:

> Q. What is your understanding of how the procurement process that you just described generally compares to the process that took place on the contracts at issue in this case?

> A. Well, my general understanding is that it's similar, it's the same, that is to say, there were announced needs, there were requests for bids, the bids were submitted. In one case there was negotiation that followed. My understanding is that it matches quite well.

(Apr. 5, 2007 PM Tr. at 78.) Defendants were free to query McAfee about this analogy on cross-examination and to argue any dissimilarities to the jury.[43]

Defendants save their harshest criticism for McAfee's assumption "that a cartel in fact existed amongst all the bidders on the USAID contracts," (Motion Five at 39; *see also* Motion Eight at 20), but yet again, meticulous examination of the record reveals no such assumption. McAfee *never* assumed

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[43] In a footnote, defendants cite certain "unique features of construction procurement" that purportedly render McAfee's theoretical model inapplicable. (Motion Five at 42 n.20.) But McAfee's model *assumes* the very sort of "complicated layered bidding and competitive negotiation" that defendants claim "distinguish" construction procurement:

> A. Assumptions about Government procurement in particular[:] . . . usually . . . there is a qualification stage for potential suppliers. In some cases suppliers are already prequalified because they have bid on other matters, but it may be open for qualifications of new bidders. And in some matters they actually have to qualify fresh to supply[.] . . . [a]nd the Government typically either picks the lowest price supplier or it negotiates with that supplier . . . .

(Apr. 5, 2007 PM Tr. at 76-77.) This excerpt also answers defendants' complaint that "McAfee's theory about efficient markets is undercut by the fact that CWO and USAID eliminated competitors from the process through nationality and source requirements." (Motion Five at 44.) Clearly, McAfee's model accounts for some winnowing of the competitive field based on factors other than pure economic efficiency.

that a cartel existed *in this case*.[44] (See, e.g., Apr. 5, 2007 PM Tr. at 78 ("Q. And I think it was correctly pointed out before the break that you're not making a determination . . . here about whether there was a cartel or not, correct? A. That's correct."); *id.* at 127 ("Q.—but you haven't made any determination whether there is a cartel in this case. A. I have not.").) Rather, he contrasted how a procurement auction would operate under competitive conditions with how it would operate under collusive conditions, (*see id.* at 78-104), leaving the jury to determine which scenario best "fit" the facts in this case.

Hence, the Court concludes McAfee's testimony as a "teaching witness" educated the jury about theoretical characteristics of collusive behavior in an auction setting and assisted them in determining whether events in this case bore the hallmarks of

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[44] Defendants also complain that "McAfee's assumption and insinuation that padding (including payoffs) must have been built into the bids is contradicted by [] unrebutted testimony." (Motion Five at 42.) Again, however, just as McAfee never assumed a cartel existed here, he likewise never assumed that any contractor *in this case* "padded" its bid *on these contracts*. Rather, he testified only that in a procurement bidding process, when a cartel exists, a bidder must incorporate certain, inherent costs of collusion—"any payments made to competitors, any payments that you make to employees . . . for added risks that they might be facing, and any payments made to subcontractors," (Apr. 5, 2007 PM Tr. at 99)—along with his anticipated cost of performance into his bid to avoid a net loss, (*id.* at 99-100). In its entirety, this testimony pertained to a hypothetical situation. McAfee neither declared nor implied that bids on Contracts 20A, 29, and 07 had been rigged. He simply described how, *in theory*, collusion like that alleged by plaintiffs would have affected an analogous contracting process.

such collusion.[45] While McAfee's model may not have mimicked the facts herein in every minute detail, it was "sufficiently tied to the facts of the case . . . [to] aid the jury in resolving [this] factual dispute." *See United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1986).

2. Reliability

"[T]he test of reliability is 'flexible,' . . . [and] the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho*, 526 U.S. at141-42. Defendants nonetheless contend the Court exceeded this broad

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[45] In their reply brief, HII and HC argue that the Court should have excluded McAfee's testimony under Federal Rule of Evidence 403. (Reply Five at 24.) Expert testimony can, indeed, be "both powerful and quite misleading." *Daubert*, 509 U.S. at 595. But if otherwise admissible, it should not be excluded under Rule 403 unless its probative value is *substantially* outweighed by the risk of unfair prejudice. Fed. R. Evid. 403. The Court recognizes that McAfee's abstract testimony on cartel behavior was, to some extent, "inherent[ly] suggestive[]." (*See* Reply Five at 24.) In their questions to McAfee, however, both parties reduced the risk of unfair prejudice to the vanishing point by *repeatedly* eliciting assurances that he was not familiar with the facts of this case, that he did not know whether collusion had occurred here or what its results might have been, and that he did not purport to render an opinion on any aspect of the underlying facts. (*See, e.g.*, Apr. 5, 2007 PM Tr. at 60-70, 78, 126-27.) By the end of McAfee's testimony, this horse was dead. Any surviving vestige of unfair prejudice did not substantially outweigh the significant probative value of McAfee's testimony. In short, McAfee explained how a cartel like that alleged by plaintiffs would theoretically have functioned, and the jurors could then compare the facts in evidence against McAfee's theoretical model, noting the similarities and differences. His testimony was highly probative and admissible under Rule 403.

latitude in admitting McAfee's testimony, which they claim was not "the product of reliable principles and methods" as required by Rule 702.[46] (Motion Eight at 21-23, 24-25.)

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[46] Defendants' complaint that McAfee "applied no principles or methods to the evidence" mistakes McAfee's role as a "teaching witness." (*See* Motion Five at 42-43.) For example, they point out that McAfee "presumably could have employed a methodology to determine whether there was a cartel at work in this case . . . and whether the most efficient firm won the bidding." (*Id.* at 42.) Had his testimony relied on facts and data admissible in evidence in this case, defendants' presumption would likely be correct. But in introducing McAfee's testimony, plaintiffs followed the "venerable practice of using expert testimony to educate the factfinder on general principles." *See* Fed. R. Evid. 702 Advisory Committee's Note. Defendants cannot obtain a new trial based on plaintiffs' entirely permissible strategic choice to use McAfee in this capacity.

This same reasoning applies to defendants' criticism that McAfee "failed to account for alternative explanations for the profits achieved on the USAID projects." (Motion Five at 42 n.31.) Had McAfee testified that collusive behavior *by these defendants* accounted for their profits *on these contracts*, then he should have accounted for possible alternative explanations. *See, e.g., Claar v. Burlington N.R.R.*, 29 F.3d 499, 502 (9th Cir. 1994). But plaintiffs asked him to testify only about collusive behavior in auction settings generally, without seeking to label defendants' behavior in this case. Defendants were free to present alternative explanations for the profits they earned to the jury, through expert testimony or other evidence. Plaintiffs had no duty to do so on their behalf.

Further, defendants' allegation that "a substantial analytic gap exist[ed] between the data and the opinion proffered" goes to the weight of the evidence, not its admissibility. (*See* Motion Five at 42.) If, indeed, McAfee's testimony addressed only "how efficient players theoretically act in an efficient market," (*id.*), then the inefficiencies defendants imply existed would detract from, but not destroy, his testimony's relevance. When an expert purports to draw conclusions about what happened in a case, his

Though "[m]any factors will bear on the [reliability] inquiry," in *Daubert*, the Supreme Court offered "some general observations" on the subject. 509 U.S. at 593. Whether a theory or technique has been tested, whether it has been subjected to peer review and publication, its potential rate of error, and its "general acceptance" may all bear on its reliability. *Id.* at 593-94. As the Court emphasized in *Kumho*, however, a trial court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable," and in doing so, it may consider any "reasonable measures" of that testimony's reliability. 526 U.S. at 152.

Because McAfee confined his testimony to general economic theory—in defense counsel's words, "vanilla economics," (Apr. 5, 2007 PM Tr. at 125)—the Court believes two factors discussed in *Daubert* are particularly "reasonable measures" by which to evaluate his testimony's reliability, *see* 526 U.S. at 152. First, according to McAfee's unrebutted statements, his theories on auctions have formed the subject of over twenty peer-reviewed articles and numerous other publications. (Apr. 5, 2007 PM Tr. at 52-54.) Second, though he did not specifically describe the provenance of each portion of his testimony, it avowedly embodied basic principles taught in undergraduate

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opinion must hew closely to the facts. *See, e.g., Groobert v. Pres. & Dirs. of Georgetown Coll.*, 219 F. Supp. 2d 1, 9-10 (D.D.C. 2002) (Urbina, J.) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). But where, as here, the expert endeavors only to educate jurors about general principles, his testimony need only be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *See Downing*, 753 F.2d at 1242.

economics courses, which indicates the theories he expounded are generally accepted in the field of economics. (*See id.* at 125.) Indeed, McAfee's credentials rendered him supremely well-qualified to testify on generally-accepted economic principles: he holds a Ph.D. and has taught at Purdue University, the University of Western Ontario, the University of Texas, and the California Institute of Technology, where he currently heads the economics department. (*Id.* at 50-51.) In light of these circumstances, the Court finds McAfee's testimony was reliable, as required by *Daubert* and Rule 702.[47]

Because McAfee's testimony as a "teaching witness" satisfied both Rule 702's criteria and *Daubert's* reliability and relevancy requirements, its admission was proper.

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[47] Defendants point to McAfee's admission that his own empirical studies have not uniformly confirmed certain of his conclusions—namely, that in an article entitled "Collusive Bidding in Hostile Takeovers," McAfee and his co-authors described a bidding cartel's "negligible effect on the target's share price." (Apr. 9, 2007 PM Tr. at 38-42.) This contrary empirical result does cast some doubt on the value of McAfee's model. (*See, e.g.*, Apr. 5, 2007 PM Tr. at 94-95 ("The purpose of bid-rigging is to . . . charge higher prices.").) But as McAfee subsequently explained, collusion among bidders in a hostile takeover situation is *legal* in the United States, which differentiates the data examined in his paper from the principles he discussed in his direct testimony. (*Compare* Apr. 9, 2007 PM Tr. at 51-52 *with* Apr. 5, 2007 PM Tr. at 99-100.) In McAfee's cartel model, collusion was illegal, and this illegality influenced bidders' behavior.

Though defendants also highlight McAfee's failure to empirically study European construction industry cartels, (*see* Motion Eight at 22), this argument is specious in light of McAfee's other qualifications.

D. Jury Instructions

Defendants next challenge several jury instructions.[48] A district court enjoys broad discretion in crafting language for jury instructions. *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 556 (D.C. Cir. 1993). Hence, "[t]he standard for determining whether an erroneous jury instruction mandates a new trial is the general harmless error standard." *In re Lorazepam & Clorazepate Antitrust Litig.*, 467 F. Supp. 2d 74, 89 (D.D.C. 2006) (Hogan, C.J.) (citing *Williams v. U.S. Elevator Corp.*, 920 F.2d 1019, 1022 (D.C. Cir. 1990)).

1. "Knowingly"

Both substantive FCA provisions alleged in plaintiffs' complaint provide for liability only when the defendant acts "knowingly." 31 U.S.C. § 3729 (b)(1), (2) (2008). In relevant part, this Court defined "knowingly" for the jury as follows:

> . . . that a defendant, with respect to information: One, had actual knowledge of the information; or two, acted in deliberate ignorance of the truth or

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[48] HII and HC incorporate by reference, in full, their written objections to plaintiffs' proposed jury instructions [828] and their objections on the record. (Motion Five at 23.) Contrary to defendants' assertion, the Court did not adopt plaintiffs' proposed instructions "wholesale," and those instructions underwent several substantive revisions before they were read to the jury. The Court will not comb through defendants' prior filing to determine which objections remain pertinent. Second, and similarly, the Court will not examine the record line by line to identify all of defense counsel's objections to jury instructions. To the extent any such objections, whether in writing or in open court, survived the instructions' revisions and are not articulated in defendants' present briefs, the Court reaffirms its prior rulings on them.

> falsity of the information; or three acted in reckless disregard of the truth or falsity of the information . . . . Plaintiffs may establish that a defendant had knowledge through circumstantial evidence . . . . If it appears from the evidence in the case that a defendant or defendants had information which would lead a reasonably prudent person to make an inquiry through which he would have surely learn[ed] certain facts, then the defendant or defendants may be found to have had actual knowledge of these facts, the same as if the defendant or defendants had made such inquiry and had actually learned such facts.

(May 4, 2007 PM Tr. at 48-49.) Defendants suggest this last sentence, referring to "reasonable inquiry," reduced the knowledge standard to one of mere negligence. (Motion Five at 24.)

Yet the FCA's *scienter* requirement clearly embraces the very circumstances the Court described. According to Judge Oberdorfer, Congress placed reckless disregard among the three alternative *scienter* tests in the FCA "to address the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered." *United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Group*, 370 F. Supp. 2d 18, 42 (D.D.C. 2005). Thus, the FCA imposes liability "not just [on] those who set out to defraud the government, but also [on] those who ignore obvious warning signs." *Crane Helicopter Servs., Inc. v. United States*, 45 Fed. Cl. 410, 433 (Fed. Cl. 1999). *See also United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997) ("the best reading of the Act defines reckless disregard as an extension of gross negligence"). The statute's legislative history confirms this reading. When Congress amended the FCA in

1986, adding the word "knowingly," the accompanying Senate Report noted that "those doing business with the Government have an obligation to make a limited inquiry to insure that the claims they submit are accurate." S. Rep. No. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272.[49] These authorities confirm it was not error for this Court to instruct the jury that failure to inquire when known facts reasonably compel such inquiry falls within the FCA's definition of "knowledge."[50]

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[49] The report elaborates further:

> In fashioning the appropriate standard of knowledge for liability under the civil False Claims Act, S. 1562 adopts the concept that individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek. A rigid definition of that "duty," however, would ignore the wide variance in sophistication of program recipients. Consequently, S. 1562 defines this obligation as "to make such inquiry as would be reasonable and prudent conduct under the circumstances to ascertain the true and accurate basis of the claim." Only those who act in "gross negligence" of this duty will be found liable under the False Claims Act.

S. Rep. No. 99-345, at 20 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5285.

[50] Even if the law will not construe a defendant's failure to make reasonable inquiry as actual knowledge, any error was harmless. As Judge Oberdorfer stated in *Ervin*, section 3729(b)'s knowledge standard embraces "the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered." *See* 370 F. Supp. 2d at 42. Whether imprudent failure to discover information connotes reckless disregard, as in *Ervin*, or actual knowledge, as this Court instructed, it satisfies the FCA's "knowingly" definition.

2. Conspiracy

The Court instructed the jury at length on the definition and elements of conspiracy, (see May 4, 2007 AM Tr. at 48, 58-65), and defendants point to several alleged errors in these instructions, two of which merit discussion.[51]

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[51] Three other complaints blatantly contradict the record. First, defendants assert the Court imposed "liability for acts of co-conspirators absent the required showing of foreseeability." (Motion Five at 27.) But the Court clearly instructed the jury: "A participant in a conspiracy . . . is liable for the acts of his co-conspirators . . . as long as those acts were reasonably foreseeable." (May 4, 2007 AM Tr. at 63.) Second, defendants claim this Court "failed to instruct on the clearly applicable intra-corporate conspiracy doctrine." (Motion Five at 27.) Yet the Court in fact instructed on this very doctrine: "no . . . conspiracy is possible under the law between corporations that are commonly owned and controlled and that regularly conduct their business affairs in such a manner as to constitute, in effect, a single business entity or enterprise." (May 4, 2007 AM Tr. at 62.) This quotation from the record also answers defendants' third complaint, that the Court was "willing[] to permit the jury to conclude that HC and HII were simultaneously co-conspirators and alter-egos." (Motion Five at 27.) Juxtaposed with portions of the alter ego definition—"a parent corporation is the principal stockholder of a subsidiary corporation and conducts its business . . . [and] the parent corporation has . . . conducted the subsidiary's business [such that] its business interests and the parent corporation's interests cannot be reasonably separated," (id. at 57)—this instruction clarified that HC and HII could not be both co-conspirators and alter egos.

Additionally, defendants claim the Court instructed "that receipt of a benefit is 'simply irrelevant' to whether a party agreed to conspire," and that this statement conflicts with Supreme Court precedent. (Motion Five at 26.) This critique misstates the record, (See May 4, 2007 AM Tr. at 63), and mischaracterizes dicta as a holding, *see Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943). But even if it were entirely accurate, receipt of a benefit would still be *inessential* to

First, defendants assert that the Court failed to instruct or improperly instructed the jury as to the intent and/or knowledge necessary to join a conspiracy. (Motion Eight at 29-31.) In their view, the Court's instructions reduced the standard to gross negligence when specific intent was required. (Reply Eight at 24.) In fact, the Court twice explained in its charge that to find a particular defendant liable for conspiracy, the jury must find that the defendant "willfully became a member of the conspiracy." (May 4, 2007 AM Tr. at 59, 60.) Defendants do not contend this instruction misstated the law, nor can they. [52] *See, e.g., United States v. White*, 116 F. 3d 903, 927 (D.C. Cir. 1997); *United States v. Yunis*, 924 F.2d 1086, 1096 (D.C. Cir. 1991).

Instead, they suggest the charge was misleading because it was not given coincident with the elements of a FCA conspiracy claim, but rather along with several pages of instructions on conspiracy generally, and because it failed to define "willfully," which the jury allegedly could have confused with the Court's

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a conspiracy. *See, e.g., United States v. Shoup*, 608 F.2d 950, 956-57 (3d Cir. 1979) (explaining why "a stake in the venture" is not an essential element of conspiracy).

[52] HII and HC's motion misreads the Court's instructions on willfulness. First, they claim the Court instructed that as to subsection (a)(3), "intent is unnecessary, and [] '[k]nowledge is all that is required under the act.'" (Motion Five at 26.) In fact, the Court made these statements while defining "knowingly," the mental state specified in subsections (a)(1) and (a)(2). (*See* May 4, 2007 AM Tr. at 48.) They further claim the Court instructed that willfulness was merely "sufficient" but not necessary to impose liability under subsection (a)(3). (Motion Five at 26.) The record reflects no such instruction. (*See* May 4, 2007 AM Tr. at 59-60.)

definition of "knowingly."[53] (Motion Eight at 30-31.) Like the trial to which they pertained, the jury instructions in this case were quite lengthy, but they were not so convoluted as to induce confusion. When the Court read the applicable provisions of the FCA, it listed their elements in accordance with the statute. (May 4, 2007 AM Tr. at 46-48.) In particular, it listed the first element of subsections (a)(1) and (a)(2) as "the defendant knowingly." (*Id.* at 46, 47.) By contrast, the Court listed the first element of subsection (a)(3) as "the defendant conspired with one or more persons." (*Id.* at 48.) The Court later separately defined "knowingly" and "conspired." (*Id.* at 49-50, 59.) While the Court could certainly have ordered these instructions differently, the order it followed was logical and within its broad discretion. *See Joy*, 999 F.2d at 556.

Second, defendants assert the Court improperly omitted damages as an essential element of FCA conspiracy. (Motion Eight at 28 n.16.) They cite this Court's Memorandum Opinion & Order of March 7, 2007 [613] listing damages as an element, which in turn cited its opinion in *United States v. Bouchey*, 860 F. Supp. 890, 893 (D.D.C. 1994). Notwithstanding this Court's language in *Bouchey*, other courts have concluded that damage to the government is *not* an essential element of FCA conspiracy. *See, e.g., United States ex rel. Finney v. NextWave Telecom, Inc.*, 337 B.R. 479, 489 (S.D.N.Y. 2006); *United States ex rel.*

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[53] It appears that defendants have adopted contradictory premises: they claim the jury must have assumed the definition of "knowingly" applied to the word "willfully," even though they are separated by a full nine pages in the transcript, but could not have associated "willfully" with FCA conspiracy *because* the two instructions were separated by nine transcript pages.

Atkinson v. Pa. Shipbuilding Co., No. 94-7316, 2004 U.S. Dist. LEXIS 14532, at *13 (E.D. Pa. July 28, 2004); *United States v. St. Luke's Subacute Hosp. & Nursing Centre, Inc.*, No. C 00-1976, 2004 U.S. Dist. LEXIS 25380, at *15 (N.D. Cal. Dec. 16, 2004); *United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 331 (S.D.N.Y. 2004). Moreover, given that the jury specifically found the government suffered damage on each contract, any error was clearly harmless.

3. Imputed Knowledge

The Court also instructed the jury on imputed knowledge and collective imputed knowledge. (May 4, 2007 AM Tr. at 54-55.) Defendants insist this instruction was flawed because it "was incomplete in that it failed to state that knowledge may be imputed *only* if the agent is acting with the intent to benefit the principal." (Motion Five at 24.)

"As a general rule, knowledge acquired by a corporation's officers or agents is properly attributable to the corporation itself." *BCCI Holdings, S.A. v. Clifford*, 964 F. Supp. 468, 478 (D.D.C. 1997) (Green, J.). *Accord United States v. Sun-Diamond Growers of Cal.*, 964 F. Supp. 486, 491 n.10 (D.D.C. 1997) (Urbina, J.) ("knowledge obtained by a corporate agent acting within the scope of his employment is imputed to the corporation"). Several exceptions to this rule exist, such as where

> the officer or agent is "adversely interested" to the corporation. This exception follows logically from the rule's purpose. It cannot be presumed that an officer or agent will communicate knowledge to a corporation where "it is to the agent's own interest not to impart the knowledge to the principal."

BCCI Holdings, S.A., 964 F. Supp. at 478 (internal citations omitted). Defendants' first complaint implicates this "adverse agent" exception.

Yet because the rule endeavors "to protect third parties . . . not [] to serve 'as a shield for unfair dealing,'" the exception "applies only to fraud *against* the corporation, not to fraud *on behalf of* the corporation." *Id.* (citing *FDIC v. Ernst & Young*, 967 F.2d 166, 171 (5th Cir. 1992)). Indeed, according to our Court of Appeals,

> [t]he Supreme Court has held that if a company's agents withhold knowledge from it, even fraudulently, that fact "cannot alter the legal effect of their acts or of their knowledge with respect to the company in regard to third parties who had no connection whatever with them in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated."

Bowen v. Mount Vernon Sav. Bank, 105 F.2d 796, 799 (D.C. Cir. 1939) (quoting *Armstrong v. Ashley*, 204 U.S. 272, 283 (1907)). *Bowen* admittedly involved very different facts from those in the instant case, but the Court of Appeals' skeptical commentary on the adverse agent exception is worth repeating:

> The so-called presumption that the principal knows what the agent knows is irrebuttable; it cannot be avoided by showing that the agent did not in fact communicate his knowledge. It should follow that it cannot be avoided by showing that the agent had such an adverse interest that he would not be likely to communicate his knowledge.

Id.

Here, considering that the corporate defendants all benefitted (at least in the short term) from the actions of their allegedly adverse agents—they obtained high-priced construction projects funded by the United States government, and according to the jury's verdict, charged the government significantly more than it would otherwise have paid—these same defendants cannot avoid imputation of their agents' knowledge in a suit by the defrauded third party, the United States. The Court concludes its omission of defendants' proposed qualifying language—"knowledge may be imputed *only* if the agent is acting with the intent to benefit the principal"—was not error.

Next, defendants contend the FCA does not permit collective knowledge imputation.[54] Yet in the FCA case they cite for this proposition, the court simply concluded *those facts* did not "warrant the use of the collective corporate knowledge doctrine." *United States v. United Techs. Corp.*, 51 F. Supp. 2d 167, 199 (D. Conn. 1999). And while the seminal case discussing this doctrine involved corporate criminal liability, *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987), the doctrine has been applied in the civil context as well, and in this Circuit, *see United States v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 1, 893-95 (D.D.C. 2006) (Kessler, J.). Absent any authority to the contrary, the Court concludes its instruction on the collective knowledge doctrine was not improper.[55]

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[54] Defendants also argue that no factual basis for a collective imputed knowledge instruction existed. (Motion Five at 25 n.10.) The factual riposte to this argument is set forth below. *See infra* part III.A.1.a.iv.

[55] Defendants characterize the doctrine's application here as "a judicial repeal of Section 3729(b)'s definition of 'knowing.'"

4. Imputed Liability

Because five of the six defendants at trial were corporations, the Court instructed the jury on multiple theories of imputed liability. (*See* May 4, 2007 AM Tr. at 52-58 (discussing, *inter alia*, respondeat superior, agency, joint venture, apparent authority, imputed

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(Reply Five at 15.) They propose that the jury could have conflated the collective imputed knowledge instruction with the Court's (allegedly) flawed definition of "knowingly" to hold HII liable for an "amalgamation of attributed information" of which its agents were "negligently unaware." (Motion Five at 25 n.11.) As explained above, any error in the Court's definition of "knowingly" was harmless. *See supra* part II.D.1. Further, defendants' critique ignores the public policy rationale for the collective knowledge doctrine:

> Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.

Bank of New England, 821 F.2d at 856. This rationale applies with equal force when the "operation" consists of defrauding the federal government, and it is in no way incompatible with section 3729(b). Indeed, the two appear complementary. The Senate Report accompanying the 1986 FCA amendments explains that the Act's definition of "knowingly" endeavors "to reach what has become known as the 'ostrich' type situation where an individual has 'buried his head in the sand.'" S. Rep. No. 99-345, at 21 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5285. Analogously, the collective knowledge doctrine ensures that "a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import," *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D.W. Va. 1974)--i.e., that each individual employee had "buried his head in the sand."

knowledge, collective imputed knowledge, and alter ego).) Defendants characterize these instructions as "repetitive" but do not specifically indicate which among the imputed liability instructions could have been excluded as purely redundant.[56] (Motion Five at 25-26.) And even had they done so, "the mere fact that an instruction is repetitive is not a basis for reversal, as long as the legal principles it enunciates are correct." *Lewy v. S. Pac. Transp. Co.*, 799 F.2d 1281, 1299 (9th Cir. 1986). Indeed, to constitute grounds for a new trial, repetitious instructions must be grossly prejudicial. *See, e.g., Howard v. Cincinnati Sheet Metal & Roofing Co.*, 234 F.2d 233, 236 (7th Cir. 1956) ("The jury was told twenty times 'your verdict should be for the defendant,' 'plaintiff cannot recover,' 'defendant would not be liable' and 'defendant would not be guilty of negligence.' . . . [T]he instructions as a whole unduly emphasized defendant's version of the case . . . ."). It is well established that federal civil plaintiffs may pursue multiple theories of liability, and where the evidence establishes an adequate factual basis, the Court may properly instruct on them. *See, e.g., Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 125 (3d Cir. 1999). Defendants cannot gain a second bite at the apple by arguing otherwise.[57] Hence, to the extent any of

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[56] In the course of giving these instructions, the Court could—as defendants suggest—have limited them to specific facts, circumstances, or parties, but defendants offer no authority suggesting it was required to do so. Moreover, considering that defendants believe the imputed knowledge instructions, as read, "occupied a disproportionate percentage of the Court's total charge," this would hardly have helped matters.

[57] HC and HII also raise several challenges to the Court's alter ego instruction. They first challenge the instruction's wording as misstating the law, (Motion Five at 27), but they

have waived this particular issue: after defense counsel represented—without drawing an objection—that the parties had "reached agreement on the language," the Court accepted HII and HC's Supplemental Proposed Jury Instruction Number 2 in lieu of plaintiffs' alter ego instruction, (*see* May 3, 2007 PM Tr. at 75-77).

Second, they contend alter ego is an issue of law for the court, rather than one of fact for the jury, but this argument fares no better than it did pretrial. This Court explained in its Memorandum Opinion & Order of March 20, 2007 [737], denying HII and HC's motion *in limine*:

> In light of the fact-specific nature of the determination, the Court finds that an alter ego analysis is a matter for the jury . . . . Moreover, there is nothing in *Labadie Coal* that creates a requirement that the *court* must determine alter ego liability. *See Labadie Coal*, 672 F.2d at 92. In fact, the issue was decided by the court in Labadie Coal only because this was not a case where the jury was a trier of fact as to any issue. *Id*. Finally, as shown by *Dorocon, Inc. v. Burke*, Civ. No. 02-2556 (CKK), 2005 WL 3454338, at *2, *15 (D.D.C. 2005) (Kollar-Kotelly, J.), a jury *may* hear and resolve an issue of liability on a veil piercing theory.

(Mem. Op. & Order of Mar. 20, 2007 [737] at 2-3.) The Court stands by its original ruling.

Third, they argue no legally sufficient evidentiary basis for the instruction existed. (Motion Five at 27.) Under *Labadie Coal*, to succeed on an alter ego claim, a plaintiff must demonstrate: 1) a "unity of interest and ownership" between parent and subsidiary such that their "separate personalities . . . no longer exist"; and 2) that an inequitable result will follow unless the corporate veil is pierced. 672 F.2d at 96. The Court agrees with HC's argument, articulated more fully in its renewed motion for judgment as a matter of law, that the government introduced only minimal evidence on these points. (*See* Motion Three at 7-14; Reply Three at 25-27.) But defendants never explain how the allegedly unwarranted alter ego instruction caused such prejudice as to comprise "a clear miscarriage of justice." *Wild v. Alster*, 377 F. Supp. 2d 186, 189 (D.D.C. 2005) (Walton, J.). In fact, plaintiffs offered ample evidence from which the jury could reasonably have found HC liable on either

defendants' challenges to the jury instructions succeeds, the error was harmless and does not compel a new trial.

E. Admission of Evidence Contrary to Stipulation

On the record during trial, the parties jointly stipulated that: "BHIC did not exist at the time Contracts 20A, 29, 07 were bid or entered into." (Apr. 25, 2007 PM Tr. at 36-37.) "The general rule is that parties are bound by stipulations voluntarily made . . . ." *Farmers Coop. Elevator Ass'n Non-Stock of Big Springs, Neb. v. Strand*, 382 F.2d 224, 231 (8th Cir. 1967). Further, "stipulations of fact fairly entered into are controlling and conclusive, and courts are bound to enforce them." *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 234 n.1 (5th Cir. 1999) (citations omitted). *Accord Fisher v. First Stamford Bank & Trust Co.*, 751 F.2d 519, 523 (2d Cir. 1984) ("stipulation of fact that is fairly entered into is controlling on the parties and the court is bound to enforce it").

BHIC claims the Court permitted plaintiffs to contradict the quoted stipulation by introducing Plaintiffs' Exhibit 682, BHIC's pre-qualification application for a contract not at issue here. (Motion Eight at 26-28.) Though defendants initially objected to the exhibit's admission on authentication grounds, (Apr. 12, 2007 AM Tr. at 63-66), the parties subsequently stipulated to its admissibility, and the Court received it "without objection," (Apr. 25, 2007 AM Tr. at 126). Hence,

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or both of their other pleaded theories—conspiracy and/or "caused to be presented." *See infra* part III.A.1.a.ii. Hence, any error was harmless.

BHIC has waived any challenge to this exhibit.[58] Defendants also point to a question relator's counsel posed to Alf Hill[59] and to a statement by government

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[58] Though defendants now insist they stipulated only to the document's authenticity, (Reply Eight at 20 n.11), they did not qualify their stipulation on the record, (*see* Apr. 25, 2007 AM Tr. at 126). Furthermore, while defendants read the document to "impl[y] that BHIC had been in existence since 1986," (Motion Eight at 27), the exhibit was relevant for unrelated reasons. For example, it was evidence that BHIC performed work on Contracts 20A and 07: "We recently completed Contract 20A in Cairo . . . and are currently constructing . . . Contract 07 in Alexandria, Egypt." (Pl.'s Ex. 682.)

[59] The exchange progressed as follows:

> Q. . . . This is a prequalification application, right?
>
> A. That's correct. Q. For June 1992? A. That's correct.
>
> Q. And the company submitting it is BHIC?
>
> A. That's correct.
>
> Q. And it's for Contract 35?
>
> A. That's correct. . . .
>
> Q. Now the last paragraph, could you read that for me, please, for the jury?
>
> A. Bill Harbert International Construction, Inc., was incorporated as BLH Enterprises, Inc., on June 10, 1986, in the State of Alabama. On December 9, 1991, the name was changed to Bill Harbert International Construction, Inc.
>
> Q. Okay. So according to this document which was submitted to the government, BHIC existed since 1986, right?
>
> A. Yes.
>
> Q. It just had a different name apparently, right?
>
> A. I don't know. It's a different name. I don't know if it's the same company.

(Apr. 12, 2007 AM Tr. at 55-57.)

counsel in closing argument[60] as contradicting the stipulation. Considered in context, however, these short blurbs merely supported plaintiffs' theory that BHIC was effectively indistinguishable from BLH Enterprises, an entity that did exist at "the time [when] Contracts 20A, 29, 07 were bid or entered into." As they explain in their opposition:

> Plaintiffs do not dispute that at the time the contracts at issue were bid or entered into BHIC by the name of BHIC did not exist. However, the evidence at trial established that a company

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[60] Government counsel argued:

> Now . . . why are we suing BHIC? . . . Now, what I want you to do to answer that question is look at a document that BHIC . . . submitted to the United States government . . . .
>
> Now you look at [page] 19A, the paragraph that's entitled "Company Background." . . .
>
> According to Mr. Lavine, what this should say is Alan Hall is out buying paper and folders and staplers and, you know, going off to Staples and Office Depot to get the office set up. But what it says is, "Bill Harbert International Construction, Inc. was incorporated as BLH Enterprises on June 10th, 1986, in the state of Alabama. On December 9, 1991, the name was changed to Bill Harbert International Construction, Inc."
>
> So BHIC was in existence at the time Bill Harbert, Roy Anderson, and Tommy Kitchens were doing what they were doing rigging the bids, dealing with the profits on Contract 20A, 07, 29. That's what they told CWO.
>
> Now just to add to this history, we look at page 22. This was what BHIC says again . . . . It says, "We've recently completed—"we," and that means BHIC—Contract 20A in Cairo and are currently constructing Contract 27 in Cairo and Contract 07 in Alexandria, Egypt."

(May 3, 2007 AM Tr. at 67-69.)

> named BLH Enterprises was originally formed in 1986 and ultimately became BHIC in 1992. BLH Enterprises, just like BHIC, was 100% owned by Bill L. Harbert. The evidence showed that one of the principal purposes of the reorganization and name change from BLH Enterprises to BHIC was to create a company that would hold ownership in, and provide support services to Bilhar.

(Opposition Eight at 12 n.9.) This position is not inconsistent with the stipulation that BHIC did not exist prior to 1992, and the Court did not breach its duty in permitting plaintiffs to argue it.[61]

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[61] Nor did the Court err in refusing defendants' requests for curative instructions (*See* May 3, 2007 AM Tr. at 107, 108.) Though the distinction does rely to some extent on semantics, plaintiffs did not stipulate that neither BHIC *nor any predecessor company* existed "at the time Contracts 20A, 29, 07 were bid or entered into." Plaintiffs did not seek to disprove the stipulated fact that BHIC did *not* exist prior to 1992. Rather, they sought to prove that BHIC, by its own admission, is a direct outgrowth of an entity that *did* exist when the bid-rigging occurred. The Court does not take lightly BHIC's concern about its counsel's credibility with the jury. (*See* Motion Eight at 28-29.) Yet the Court has confidence that after hearing testimony concerning the complex corporate restructuring from which most of these defendants emerged, the jury was able to appreciate the distinction between plaintiffs' argument and the stipulated fact.

Additionally, "a curative instruction that Plaintiffs were asserting no claims that BHIC made misrepresentations to the government on Contract 35" was also unnecessary. (See Motion Eight at 28 n.15.) Plaintiffs never argued such a claim to the jury, and "Contract 35" appeared nowhere on the verdict form.

F. Judicial Bias

Defendants next seek a new trial based on an alleged appearance of judicial bias created by this Court's comments, questions, and evidentiary rulings. (Motion Eight at 9-18.) In evaluating this claim, the Court "consider[s] the record as a whole, not merely isolated remarks."[62] *Newman v. A.E. Staley Mfg. Co.*, 648 F.2d 330, 334-35 (5th Cir. 1981)."

"A trial judge is not required to sit mute in the courtroom and merely wield his gavel as moderator." *United States v. Jackson*, 627 F.2d 1198, 1206 (D.C. Cir. 1980), *overruled in part on other grounds by United States v. Lipscomb*, 702 F.2d 1049, 1053-54 (D.C. Cir. 1983). Rather, a judge may "interrogate witnesses," Fed. R. Evid. 614(b), "when he deems that

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[62] As defendants correctly note, "[t]he influence of a trial judge on the jury is necessarily and properly of great weight." *Quercia v. United States*, 289 U.S. 466, 470 (1933). Yet twice during the trial—at the opening and close of the evidence—this Court instructed the jury:

> You should not infer or conclude from any ruling or other comment that I make that I have any opinion on the merits of the case favoring one side or the other. I do not favor one side or the other. . . . During the course of the trial I may ask a question of a witness. You should not take my questions to witnesses as [] any indication as to my opinion of how you should determine the facts. If I say or do anything at any time during this case, including giving these instructions[,] which seem[s] to indicate my opinion on any of the evidence, then I instruct[] you to disregard that indication. Nothing I say or do should influence or suggest to you that I favor any party in this case. I did not mean to express or suggest any opinion about which witnesses should be believed or which facts are established.

(Mar. 20, 2007 AM Tr. at 20-21, 23. *See also* May 4, 2007 AM Tr. at 27 (near-identical language).) If such instructions were *entirely* futile, courts would not give them.

the end of justice may be served thereby and for the purpose of making the case clear to the jurors," *Griffin v. United States*, 164 F.2d 903, 904 (D.C. Cir. 1947). Though they should not ask "questions that signal their belief or disbelief of witnesses," *United States v. Tilghman*, 134 F. 3d 414, 416 (D.C. Cir. 1998), "[j]udges enjoy broad latitude regarding the type of questions asked and the extent of their questioning," *United States v. Stover*, 329 F.3d 859, 868 (D.C. Cir. 2003).

Considered in context, the Court's challenged questions and comments did not exceed this "broad latitude." First, during Ernest Teal's testimony, relator's counsel queried him about a proposed audit of Contract 20A. (Mar. 28, 2007 AM Tr. at 47-55.) According to Teal, he "had determined that we needed to go take a look at" Contract 20A but never followed through with an audit because a superior, Jurgen Schoenwasser, directed him not to do so. (*Id.* at 47, 49.) Relator's counsel asked Teal whether "any other superior [had] ever[] overruled [his] decision to conduct an audit," to which Teal responded negatively. (*Id.* at 54.) This Court then asked, "That's like a red flag to a bull, isn't it, to an auditor[]?" (*Id.*) Teal answered, "To me it was, yes, sir." (*Id.* at 55.) Defendants insist the Court's question "clearly told the jury that the Judge believed there was something sinister in the cancellation of the audit."[63] (Motion

[63] Absent the Court's question, defendants suggest the jury could reasonably have concluded "there was no significance to the lack of an audit." (Motion Eight at 11.) But this alternative interpretation is not altogether plausible: while Teal's testimony suggested that an audit might have been more productive after the job was done, or at least once work had started, these timing considerations would not explain why Schoenwasser refused Teal's offer to reschedule. (*See* Mar. 28, 2007 AM Tr. at 52, 92-93.)

Eight at 11.) Yet the Court simply asked *Teal if*—in light of his auditor's training—he found something amiss in Schoenwasser's order. Teal was free to disagree, and defendants had ample opportunity to cross-examine on this point (and did).

Second, after a lengthy cross-examination concerning the revised engineer's estimate on Contract 20A, the Court asked Michael Gould a series of questions:

> THE COURT: Do you know if it was the same people that did the May estimate as did the October estimate for AMBRIC?
> THE WITNESS: I do believe that's true, Your Honor . . . .
> THE COURT: Wasn't it unusual, in your experience, for the bids to come back at double [] the original engineer's estimate . . . ?
> THE WITNESS: Yes, we thought that was very unusual.
> THE COURT: Ever happen before?
> THE WITNESS: We've had bids come in considerably higher than the engineer's estimate, but I don't recall having them come in double.

(Apr. 5, 2007 AM Tr. at 81.) Defendants contend this exchange "suggested to the jury that the Judge discounted the original . . . estimate, rejected the fully developed AMBRIC estimate . . . and viewed the [revised engineer's] estimate to be the proper one for comparison." (Motion Eight at 12.) Objectively, however, the Court's questions do not bear this interpretation. Rather, they helped the jury to put the discrepancies among the bids and estimates in proper context.[64]

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[64] To wit, had different individuals produced the May and October estimates, their variance might be more easily explica-

Third, defendants argue the Court's interaction with plaintiffs' expert demonstrated that the Court believed the winning bids on all contracts must have been inflated, and that a bid-rigging conspiracy existed. (Motion Eight at 13.) Each question or comment that defendants cite, however, did nothing more than provide helpful clarification to the jury.[65]

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ble. Similarly, lay jurors would have no way of knowing whether such discrepancies might be common among estimates and bids on large-scale construction projects. The Court's questions helped the jury to properly evaluate the disparity.

[65] Defendants first take issue with the following exchange:

> Q. . . . Let's talk for a minute about whether or not the estimators or the people who are actually valuing this job know about any agreements. Now, would you agree with me, sir, that, under your analysis, that being the assumption of a cartel, the assumption of increased prices, that people had to know when they bid the jobs? . . . .
>
> A. No, it's not correct. . . . I would agree that upper management at some level has to know. . . . I agree that [som]eone submitting the bid has to be influenced by somebody who knows about the cartel . . . .
>
> Q. Right. And if there is no evidence of that, then, again, your analysis is not relevant . . . .
>
> A. I, in fact, would have said exactly the opposite. I would have said that, if there is no evidence, that you can infer—if we know that there is a cartel—remember, I'm still under the hypothesis—I think you can infer that management had some mechanism for influencing the bid; otherwise, they engaged in really bad management.
>
> Q. That is—
>
> THE COURT: There was no point to have the cartel.
>
> THE WITNESS: Well, and, moreover, they have to make payments and they are getting no return on their investment.

(Apr. 5, 2007 PM Tr. at 138-40.) The Court's question simply clarified McAfee's testimony that assuming a cartel whose objective was to secure contracts at higher prices than would be obtainable through competitive bidding, it would be "really bad management" to allow one's subordinates to proceed as though the company would be competing for the contract. In short, there would be no point to having formed the cartel if bids were to be formulated competitively. Defendants juxtapose the Court's comment with its ruling immediately afterward sustaining an objection to defense counsel's question, "And that's very possibly what happened in this case, sir[?]" (Motion Eight at 13; Apr. 5, 2007 PM Tr. at 140.) Yet the Court ruled properly on this objection: as established *ad nauseum* by counsel for both sides, McAfee lacked knowledge of the facts and was not prepared to render an opinion on what happened in this case.

Defendants next find fault with the following dialogue:

> Q. . . . If you have a situation where you have two bidders on a contract and they compete . . . then your cartel assessment is not applicable to that contract; is that correct, sir?
>
> . . .
>
> A. Yes, in the hypothetical you just gave me, my assumption of a cartel would be wrong.
>
> Q. Right
>
> THE COURT: But in his hypothetical, if another company did not bid, then you could have a cartel.
>
> THE WITNESS: Oh well, then I had three bidders, one of whom was paid off not to bid, and I would then have a cartel, yes.

(Apr. 5, 2007 PM Tr. at 133-35.) Again, the Court's objective was clarification: for McAfee, the generic term "bidders" included not just *actual* bidders but also those parties referred to as "schleppers," *potential* bidders paid by the actual bidders not to bid. (*Id.* at 113, 135.) Defendants also suggest the elicited testimony contradicted the evidence, (Motion Eight at 14), but as this amounts to an evidentiary sufficiency argument, the Court will address it below, *see infra* part III.A. 1.a.

Finally, defendants contend this Court's rulings on objections "clearly telegraphed to the jury [its] view of the case." (Motion Eight at 15.) They first cite three instances in which the Court overruled their objections that plaintiffs' counsel's questions misstated the evidence.[66] (*See* Mar. 26, 2007 AM Tr. at 16; Mar. 30, 2007 PM Tr. at 78; Apr. 17, 2007 PM Tr. at 63.) Their disagreement with these rulings amounts to an attack on the sufficiency of the evidence that Greselin reached an agreement with Schmidt on Contract 29, and that Harbert-Jones was a party to collusion on Contract 07. (*See* Motion Eight at 15-16.) The Court

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In passing, defendants refer to two other exchanges between the Court and McAfee. First, after McAfee affirmed that the three depositions listed on a document were the three he would have reviewed "[p]rior to [his] deposition" and stated he did not recall whether he had subsequently *requested* others, the Court asked, "But I take it from your prior answer you implied you did, in fact, review others?" (Apr. 9, 2007 PM Tr. at 7-8.) McAfee's answer left open whether he had subsequently *reviewed* other depositions *after* his own; the Court sought only to fill this void. Second, defendants object to the Court's elaborating on a hypothetical posed to McAfee by plaintiffs' counsel on redirect. (*See id.* at 65-67.) Following up on cross-examination questions by HC's counsel, plaintiffs' counsel read an excerpt of Ruggieri's testimony and asked how it would "fit with the economic theory and analysis" McAfee had discussed on direct. (*Id.* at 64-65.) Understandably, given his limited knowledge of the facts, McAfee needed more information to answer the question. The Court simply amplified the "hypothetical" until McAfee had sufficient "context to understand how [the] testimony fit[]." (*Id.* at 65-67.) This was not error.

[66] For some reason, defendants also choose to quote a question by government's counsel to which the Court *sustained* defendants' objections. (See Motion Eight at 16 (quoting Apr. 17, 2007 PM Tr. at 87).) It is unclear whether and on what grounds defendants challenge this ruling.

will address these matters below. *See infra* part III.A.2-3.

Additionally, defendants point to two instances in which the Court sustained plaintiffs' objections that defense counsel's questions misstated the evidence. (Motion Eight at 17.) In both cases, however, defendants' questions did misstate the evidence. First, Ollis testified that Anderson did not identify which contract had been "set up;" he did not, as defense counsel stated, deny that Anderson was speaking of Contract 20A. (Mar. 28, 2007 AM Tr. at 15.) Second, HC's counsel stated during his cross-examination of McAfee that

> Fru-Con, the people who were involved with these discussions about payoffs, never told the people doing the actual bidding that there was anything going on, any bid rigging or anything like that, and that those people who actually did the bidding came up with their best bid of $131 million.

(Apr. 5, 2007 PM Tr. at 114.) Contrary to defendants' assertions, Dieter Kadenbach's testimony—that *to his knowledge*, no estimator knew of his conversations with Schmidt or was influenced by conversations with competitors, (Mar. 22, 2007 PM Tr. at 14, 25)—does not establish that the "people doing the actual bidding" were wholly ignorant of any collusive agreement and also immune to pressure from those in the know.

Considering the record as a whole, *Newman v. A.E. Staley Mfg. Co.*, 648 F.2d 330, 334- 35 (5th Cir. 1981), the Court concludes its comments, questions, and evidentiary rulings did not create an appearance of judicial bias that would compel a new trial.

G. Admission of Finances Evidence

Before trial, the Court denied motions by HII and HC to exclude evidence of defendants' current wealth and of their profits on the three contracts at issue. (Order of Mar. 15, 2007 [723] at 3, 4-5.) Declining to issue a "blanket exclusion," the Court observed that wealth evidence "could prove relevant," and that there were "many potential, permissible uses" for profits evidence. (*Id.*) During the trial, plaintiffs introduced both types of evidence, and defendants now insist the Court should have excluded this evidence as irrelevant, or alternatively, under Federal Rule of Evidence 403. (Motion Five at 30-33, 34-47.)[67]

1. Profits

The FCA expressly provides that a violator may be liable only for the "amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3129(a) (2008). Hence, the proper measure of damages in this FCA action was "the difference between what the United States paid and what it would have paid had there been no bid-rigging agreement."[68] (May 4, 2007 AM Tr. at 65

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[67] Separately, BHIC and HUK demand a new trial because plaintiffs referred to profits in their arguments on damages. (Motion Eight at 25-26 ("Profits in themselves are completely irrelevant" to FCA damages).) They do not specify which evidentiary rule this argument breached, so the Court construes it as attacking relevancy.

[68] Defendants contend that plaintiffs "employed a concerted strategy" to confuse the jury about the proper measure of damages by inserting the word "should" in place of the word "would" at critical points in their presentation. (Reply Five at 17 & n.16. *See also* Motion Two at 8.) In such a complex case, it is hardly surprising that plaintiffs' counsel may have misspoken or made typographical errors on a bare handful of occasions. Moreover,

(final jury instruction).) *See also United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 922-23 (4th Cir. 2003) ("the amount of money the government paid by reason of the false statements over and above what it would have paid absent the false statement"), *followed by United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Group*, 370 F. Supp. 2d 18, 55 (D.D.C. 2005) (Oberdorfer, J.); *United States v. Mackby*, 339 F.3d 1013, 1018 (9th Cir. 2003), *cert. denied* 541 U.S. 936 (2004) ("Ordinarily the measure of the government's damages under the FCA would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." (citation omitted)).

Yet "where the defendant by his own wrong has prevented a [] precise computation" of this difference, damages are not entirely foreclosed. *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946). *See also New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1077 (2d Cir. 1988) (plaintiff's burden of proving what would have been paid absent collusion is lightened where "there is a dearth of market information unaffected by the collusive action of the defendants"). Though "the jury may not render a verdict based on speculation or guesswork," in such a case it "may make a just and reasonable estimate of the damage

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even assuming that defendants are correct in attributing nefarious motives to their adversaries, the Court's instruction on the proper measure of damages—"the difference between what the United States paid and what it *would* have paid had there been no bid-rigging agreement," (May 4, 2007 AM Tr. at 65 (emphasis added))—eliminated any confusion engendered by plaintiffs' counsel's single misstatement during closing, (May 1, 2007 PM Tr. at 71).

based on relevant data."[69] *Bigelow*, 327 U.S. at 264. *See also Samaritan Inns v. District of Columbia*, 114 F.3d 1227, 1235 (D.C. Cir. 1997) ("Although a court will not permit a plaintiff to recover damages based on 'mere speculation or guess,' the fact that an estimate is uncertain or inexact will not defeat recovery, once the fact of injury is shown." (citations omitted)).

As defendants rightly point out, profits should not be used as an automatic proxy when a defendant's conduct has obscured the difference between what the government paid and what it would have paid but for the fraud. *See United States ex rel. Taylor v. Gabelli*, No. 03-8762, 2005 U.S. Dist. LEXIS 26821, at *50-51 (S.D.N.Y. Nov. 4, 2005) ("False Claims Act does not permit the Relator to disgorge defendants' profits"). Yet this does not render profits wholly irrelevant.

Once it found liability, to calculate damages, the jury had to determine "what [the government] would have paid had there been no bid-rigging agreement." (*See* May 4, 2007 AM Tr. at 65.) Because each contract was unique, no perfectly comparable data—the winning bid for an identical project, produced under identical conditions, absent collusion among the bidders—was available.[70] Hence, due to defendants'

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[69] While *Bigelow* involved the Sherman Act, not the FCA, the Supreme Court confirmed this "ancient" principle—"that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"—"is not restricted to proof of damage in antitrust suits." 327 U.S. at 265.

[70] For this very reason, plaintiffs were "reliev[ed] [] of their burden to prove damages with" precision. (*Contra* Reply Five at 17 n.17.) While there may not have been a "dearth of market information" generally, the array of facts to which defendants point does not include any evidence of a readily comparable con-

collusion, the jury could not precisely determine what the government would have paid on any of the three contracts under competitive conditions, and it was left to consider other "relevant data." *See Bigelow*, 327 U.S. at 264.

Plaintiffs suggest profits could be among these "relevant data" because "evidence of total job costs plus a reasonable profit—calculated by subtracting the profits from the total contract price and adding in a typical profit percentage supported by the evidence—is indicative of what the fair market value of the contracts would have been absent collusion." (Opposition Five at 29- 30. *See also id.* at 30 n.33 (describing supporting evidence).) Defendants respond that no evidence demonstrates "how the *final* costs of a project are indicative of the bid amount the government would have accepted for a project had there been open, competitive and uncontrolled bidding." (Reply Five at 17-18.) Essentially, they contend plaintiffs mistakenly interchange final costs (which determine ultimate profits) with estimated costs (which factor into a bid).

But plaintiffs' proposed equation is not completely off the mark. Plaintiffs offered evidence that, *inter alia*, profits on international construction contracts of this type typically fell in the 6-15% range. (*See, e.g.*,

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tract price set under competitive conditions. (*See id.*) Further, there was no need for plaintiffs to "demonstrate that it would have been impossible to present" evidence of the true difference between what the government paid and what it would have paid absent collusion. (*See* Motion Six at 7.) In seeking judgment notwithstanding the verdict, BHIC and HUK suggest plaintiffs could have hired an expert to calculate the government's precise damages. (*Id.*) Considering the innumerable variables involved, such a calculation would be wildly speculative.

Mar. 21, 2007 AM Tr. at 82-83; Mar. 22, 2007 AM Tr. at 36, 63; Mar. 28, 2007 AM Tr. at 60.) Thus, generally, a competitive bidder's final costs equal 85-94% of his winning bid (what the government pays). Plaintiffs presented evidence of these defendants' final costs—their bids less their profits. (*See* Mar. 14, 2007 AM Tr. at 96-97; Pl.'s Ex. 622; Mar. 26, 2007 AM Tr. at 83-84; Pl.'s Ex. 636.) Plaintiffs propose that these values would have comprised 85-94% of successful bids in a competitive environment—that is, what the government would have paid. This chain of reasoning is far from illogical, and it need not—and indeed, as explained above, *could* not—yield the precise amount the government would have paid absent collusion. It simply provides a reasonable proxy. To this extent, then, profits evidence was relevant to damages.[71]

Nevertheless, defendants assert the risk of unfair prejudice from this evidence substantially outweighed its probative value because coupled with plaintiffs' explicit appeals, it encouraged the jury to substitute disgorgement of profits for the proper damages measure. (Motion Five at 33; Reply Five at 18-20; Reply Eight at 18-19.) During closing arguments, government's counsel and relator's

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[71] The Court does not suggest profits were the only relevant data the jury could have considered in crafting its damages award. *See United States v. Killough*, 848 F.2d 1523, 1532 (11th Cir. 1988) ("trier of fact must deduce [value crucial to FCA damages measure] from all the evidence presented"). The jury might also have considered, *inter alia*, the various bids and engineer's estimates as well as side payments to co-conspirators. *See infra* part III.A. 1.b. To be relevant to damages, these pieces of evidence need only bear some relationship to "the difference between what the United States paid and what it would have paid had there been no bid-rigging agreement."

counsel both referred to defendants' profits.[72] But read in context, their comments amounted to nothing more than a simple, entirely permissible argument: if Harbert-Jones felt it necessary to "hide" $25 million in profits on Contract 20A, then apparently even *they* thought the government had paid (at least) an extra $25 million due to the bid-rigging. Plaintiffs simply pointed to another "relevant dat[um]" for the jury to consider when calculating the premium the government paid due to the bid-rigging.

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[72] Counsel for the government "walk[ed] through [] several methods of [computing] damages" with the jury. (May 1, 2007 PM Tr. at 72.) He referred to "method 4" as yielding a "bare minimum on 20A" based on Terry Musika's chart. (*Id.* at 75.) He then argued as follows:

> So on this method the $30 million is the key. That's the number, keep in mind, that was actually on the Harbert-Jones books. That's what they reported on their books as the profit on 20A, and you'll recall that that was a 28 percent . . . profit. If you subtract the true profit—that is, the $55 million—which includes the profit hidden . . . from the $30 million . . . they got a bare minimum of 25, and we think this is relevant as a floor, an absolute floor. We're not saying that that's the number you should use . . . because . . . why in the world would anyone ever let them hide the bulk of the profits and walk away with them?

(*Id.*) Counsel for relator argued similarly:

> The amount of profits, the true profits, were $55 million. That's with all of the bogus expenses added back in there. We know that the amount of profits that Harbert-Jones reported on its books is $30 million . . . So what we've done is said the difference between 55 and 30, the $25 million, gives the defendants what they reported on their books. It holds them to the number they wrote on the books . . . but takes away . . . what they hid . . . . So that's the minimum. That's the floor, the very bottom.

(May 3, 2007 PM Tr. at 40-41.)

In any event, if plaintiffs' counsel *did* intend to encourage the jury to adopt disgorgement as a remedy, their efforts obviously failed. As to each contract, the jury's damages award was considerably lower than the correlative profits. (*Compare* Verdict Form [858] at 9 ($29,920,000 on Contract 20A), *with* Mar. 14, 2007 AM Tr. at 96-97 ($55 million in total profits on Contract 20A); Verdict Form [858] at 10 ($3.4 million on Contract 29), *with* Mar. 26, 2007 AM Tr. at 83- 84, Pl.'s Ex. 636 ($58.5 million on Contract 29); *and* Verdict Form [858] at 12 ($1,026,029.22 on Contract 07), with Pl.'s Ex. 622 ($19 million on Contract 07).)

2. Wealth

Though the Court did decline to issue a blanket exclusion, it was "hard pressed to imagine how [] evidence [of defendants' financial condition] could be relevant, or how any relevance could help but be substantially outweighed by the undue prejudice and confusion likely to ensue." (Order of Mar. 16, 2007 [723] at 3.) Indeed, "[c]ourts have held that appealing to the sympathy of jurors through references to the relative wealth of the defendants . . . is improper and may be cause for reversal." *Adams Labs. v. Jacobs Eng'g Co., Inc.*, 761 F.2d 1218, 1226 (7th Cir. 1985). And remarks "suggesting that the defendant should respond in damages because it was rich and the plaintiff poor" may be grounds for a new trial. *Wash. Annapolis Hotel Co. v. Riddle*, 171 F.2d 732, 740 (D.C. Cir. 1948). More broadly, however, isolated remarks, themselves prejudicial, may have minimal or no impact on the jury in the course of a lengthy trial. *See, e.g., United States v. Edmond*, 52 F.3d 1080, 1102 (D.C. Cir. 1995) (isolated comments by judge to

defense counsel purportedly evincing bias did not warrant new trial).

While cross-examining Raymond Harbert, relator's counsel inquired about the wealth of HII, HC, and non-defendant Harbert Management Company ("HMC"), which manages HC's and other third parties' assets. (Apr. 24, 2007 AM Tr. at 16.) He asked Harbert about HII's current revenues as well as the values HMC manages for its clients, generally, and for HC, in particular. (*Id.* at 10, 16-17, 18.) Defendants insist these facts bore no relevance to any material issue in the case, and that relator's counsel elicited them only to incite jury bias. (Motion Five at 34-37.)

First, this evidence was relevant. In *Labadie Coal Co. v. Black*, 672 F.2d 92 (D.C. Cir. 1982), our Court of Appeals adopted a two-part inquiry to be pursued in determining whether to pierce a corporate veil. 672 F.2d at 96. For present purposes, only the second element, fairness, matters: "if the acts are treated as those of the [subsidiary] corporation alone, will an inequitable result follow?" *Id.* Though fraud and purposeful undercapitalization both satisfy this prong of *Labadie*, neither is a prerequisite to veil-piercing: "a case must only 'present an element of injustice or fundamental unfairness.'" *Id.* at 99 (quoting *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 687 (4th Cir. 1976)). Thus, where "adherence to corporate form . . . could very well 'lead to an evasion of legal obligations,'" evidence of a defendant's present financial condition will be relevant to the alter ego analysis. *Bufco Corp. v. NLRB*, 147 F.3d 964, 969 (D.C. Cir. 1998) (quoting *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993)). Here, the Court had barred relator from

pursuing an alter ego theory of liability at trial, (Mem. Op. & Order of Mar. 14, 2007 [716] at 4), but the government remained free to do so, and did. Evidence of HII and HC's present financial condition was relevant to whether adherence to corporate form in this case might allow the putative alter ego, HC, to evade the impact of a judgment against an inadequately capitalized HII.[73] *Bufco Corp.*, 147 F.3d at 969. It matters not that relator's counsel, rather than government counsel, elicited the information.

Second, defendants insist that coupled with plaintiffs' improper arguments, this information tended to "appeal to the sympathy of the jurors [and] to incite an anti-defendant bias." (Motion Five at 35.) This contention implicates Federal Rule of Evidence 403. Thus, though as explained above, evidence of defendants' wealth had probative value—indeed, under *Labadie*, it was crucial to the government's alter ego theory—the Court must still determine whether the risk of unfair prejudice substantially outweighed this value.

Reasonably, knowledge that a defendant has the resources to pay a judgment may increase jurors' comfort level in making a large damages award. As the cases defendants cite suggest, however, this danger will most likely materialize when a vast disparity in wealth exists between the parties. *See, e.g., Adams Labs., Inc.*, 761 F.2d at 1226 ("references to the rela-

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[73] This logic does not extend to Raymond Harbert's testimony concerning the total value of assets HMC manages for its clients. But however prejudicial this information may have been independently, a few isolated phrases uttered in the course of seven weeks of testimony do not create the sort of pervasive prejudice that will merit a new trial. *See Edmond*, 52 F.3d at 1102.

tive wealth of the defendants in contrast to the relative poverty of the plaintiffs" are improper); *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978) ("references to financial disparity" are improper); *Wash. Annapolis Hotel Co.*, 171 F.2d at 740. In closing, relator's counsel did refer to the "less fortunate people in other countries" whom USAID might have assisted with the excess funds paid to defendants due to the bid-rigging.[74] (May 3, 2007 PM Tr. at 17.) But plaintiffs here never even approached the sort of egregious misconduct and overt pandering that have compelled reversal or a new trial in other cases. *See, e.g., Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 285 (5th Cir. 1975) (during closing argument, counsel discussed "the value which his own son would place on his father's life, . . . [his] personal association with the deceased, [and] the image of deceased's children crying at graveside and forlornly awaiting the return of their father").

After careful consideration, the Court does not believe that a bare handful of remarks in the course of a seven-week trial, cherry-picked by defendants from all over the record, created such unfair prejudice as to *substantially outweigh* the significant probative value of evidence of defendants' wealth. That defense counsel, from the outset, attempted to paint defendants as "deep pockets" targeted due to their financial success, only bolsters this conclusion. Defense counsel opened with this theme,[75] returned

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[74] Similarly, government counsel elicited from Michael Gould that the U.S. would devote any damages recovered in this lawsuit to other construction projects in Egypt. (Apr. 3, 2007 PM Tr. at 119-20.)

[75] *See* Mar. 20, 2007 PM Tr. at 36 (characterizing relator as "desperate [in the] pursuit of money"), 38-39 (characterizing

to it while cross-examining the relator,[76] and finally, cleverly wove the complained of testimony into that theme during closing:

> If there was ever a doubt about why these plaintiffs have focused on [HII], that doubt must have been erased for you when Raymond Harbert was on the stand and Mr. Cultice was cross-examining him. Remember all those questions about *how much HII is worth today*, fifteen years after the events in question? Do you remember that Mr. Cultice thought it was necessary for you to know that Mr. Harbert's new business that wasn't even formed until HII was out of the construction business, manages *billions of dollars of assets*?

(May 2, 2007 PM Tr. at 7 (emphasis added).) As defense counsel spoke these words to the jury, a slide depicting seven, green dollar signs projected onto a screen behind him. In light of this display, defendants' complaints of unfair prejudice ring somewhat hollow.

The Court concludes evidence of HC and HII's wealth was relevant, and though it posed a danger of unfair prejudice, this danger did not substantially outweigh the information's probative value.

H. Apportionment of Damages

Lastly, defendants seek a new trial because they contend the jury should have been directed to

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John Harbert as a "man you could trust" and describing his "very large and successful business . . . [with] interests [that] ranged well beyond construction" and that became "so diverse that he formed an umbrella company").)

[76] (*See* Mar. 29, 2007 PM Tr. at 65 (closing relator's cross-examination with, "And isn't it the case that sometimes innocent corporations get swept up just because they have money?").)

apportion damages among the various defendants. (Motion Five at 44-45.)

As a general matter, "the form of verdict is within the trial court's discretion." *Hall v. Gen. Motors Corp.*, 647 F.2d 175, 179 n.10 (D.C. Cir. 1980). And more specifically, "[w]here . . . defendants, if liable at all, are liable for causing the same injury, a jury given special interrogatories should be asked what amount of damages the plaintiff has suffered. All defendants found liable for the injury are then jointly and severally liable for the single award of compensatory damages." *Gagnon v. Ball*, 696 F.2d 17, 19 n.2 (2d Cir. 1982). Joint and several liability applies equally in a FCA case. *United States v. Uzzell*, 648 F. Supp. 1362, 1368 (D.D.C. 1986) (Green, J.).

The verdict form in this case asked the jury to determine which defendants, if any, had participated in a conspiracy and which defendants, if any, had committed substantive FCA violations as to each contract.[77] (Verdict Form [858] at 2-8.) It then

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[77] HII contends "it was critical . . . to have its responsibility for the alleged submission of false claims, if any, separately determined by the jury [because] HII was not a partner in the Harbert-Jones 20A and 07 joint ventures at the time any claims were submitted, and [] exited the international construction business altogether while these projects were still underway." (Reply Five at 20.) Further, HII points to the FCA's *scienter* requirement, which must be "satisfied as to each defendant and as to each claim." (*Id.*) These arguments implicate *liability*, not damages. Moreover, the verdict form, as administered, answered both: the jury specifically found that HII "knowingly made, used or caused to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government," and that it "knowingly presented or caused to be presented a false or fraudulent claim for payment or approval to the United States," on each of the three contracts. (Verdict Form [858] at 3-8.)

required them to determine how much damage any liable defendants had caused the government on each contract.[78] (Id. at 9- 12.) Under joint and several liability, this procedure was proper.[79]

In sum, close examination of defendants' proposed grounds for a new trial divulges no "clear miscarriage of justice" or "manifest error of law or fact." *See Wild v. Alster*, 377 F. Supp. 2d 186, 189 (D.D.C. 2005) (Walton, J.); *Nyman v. FDIC*, 967 F. Supp. 1562, 1569 (D.D.C. 1997) (Urbina, J.). To the extent defendants' motions seek a new trial on the bases canvassed above, or on any other ground not herein discussed, they shall be DENIED.

III. JNOV Motions

A. Sufficiency of the Evidence

Defendants challenge the sufficiency of the evidence in virtually every respect. In addressing their

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[78] Because plaintiffs retained a live cause of action against defendant Anderson only as to a single claim submitted pursuant to Contract 29, but had live claims against the other defendants as to *all* claims submitted on *each* contract, the jury was asked to separately determine the damages attributable to Anderson's conduct. (*See* Verdict Form [858] at 11.)

[79] Defendants argue that the Court's adoption, in the Memorandum Opinion accompanying its judgment, of the "proportionate share" approach confirms the need for a jury to allocate damages among them. (Motion Five at 44-45.) As explained below, *see infra* part IV.A.2, the Court erred in applying *McDermott, Inc. v. Amclyde*, 511 U.S. 202 (1994), to refuse defendant Anderson a proportionate offset based on payments the government received from settling co-defendants. While the Court referred again to *McDermott* in apportioning that offset across the three contracts with respect to the other defendants, it relied only on *McDermott's* broad, motivating principles. *See infra* part IV.A.2.

various arguments, the Court will separately examine the evidence, as to each contract, of liability and damages.[80] Plaintiffs' complaints stated claims under three separate FCA provisions, two substantive and one inchoate: (1) knowingly presenting (or causing to be presented) a false or fraudulent claim to the government for payment or approval;[81] (2) knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government;[82] and (3) conspiring to defraud the government by getting a false or fraudulent claim allowed or paid.[83] 31 U.S.C.

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[80] The damages measure in a FCA case—"the difference between what the United States paid and what it would have paid had there been no bid-rigging agreement," (May 4, 2007 AM Tr. at 65 (final jury instruction))—incorporates a causal link between the bid-rigging and harm to the government, so the Court will not undertake separate causation analyses.

[81] The elements of this "caused to be presented" claim are: (1) the defendant knowingly; (2) submitted a claim, or caused a claim to be submitted, to the government; (3) that was false or fraudulent. (May 4, 2007 AM Tr. at 46.)

[82] The elements of this "caused to be made" claim are: (1) the defendant knowingly; (2) either made or used, or caused another make or use, a false record or statement to get the government to pay its claim; (3) that the record or statement was false or fraudulent. (May 4, 2007 AM Tr. at 47.)

[83] The elements of FCA conspiracy are: (1) the defendant conspired with one or more persons; (2) to get a false or fraudulent claim allowed or paid by the United States; (3) and one or more conspirators performed any act to effect the object of the conspiracy. (May 4, 2007 AM Tr. at 48.) To prove the defendant conspired, a plaintiff must prove: (1) an agreement to commit an unlawful act or to commit a lawful act by unlawful means; (2) that the defendant willfully joined, either at its inception or afterwards; and (3) one or more conspirators knowingly committed one or more overt acts in furtherance of some object or purpose of the conspiracy. (May 4, 2007 AM Tr. at 59-61.) Claims

§ 3729(a) (2008). To the extent defendants separately challenge them in their motions, the Court will evaluate the evidence supporting the jury's liability findings regarding each provision for each contract.

1. Contract 20A

a. Liability

In May 1988, Peter Schmidt of Holzmann, Jones' German parent company, gathered a group of prequalified Contract 20A bidders at Holzmann's Frankfurt headquarters—among them, Dieter Kadenbach of Bilfinger & Berger, Fru-Con's European parent.[84] (Mar. 22, 2007 AM Tr. at 80-82.) Schmidt asked the other bidders to ensure Jones' planned joint venture with HII—Harbert-Jones—would secure the contract by offering higher bids. (*Id.* at 82-83.)

Some weeks later, Kadenbach spoke to Schmidt by phone. (*Id.* at 83.) Schmidt claimed he "could find a solution or an arrangement with the other competitors," and the two men then reached a verbal agreement whereby Fru-Con would bid higher than Harbert-Jones in exchange for 2-3% of the final contract price. (*Id.* at 82-83.) Pursuant to this agreement, Kadenbach ensured that a 15% markup—roughly $20 million—was added to Fru-Con's August and December 1988 bids on Contract 20A. (*Id.* at 87-

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submitted to the government under any contract secured through a collusive conspiracy are, inevitably, false or fraudulent, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543-45 (1943), and it is undisputed that claims were submitted pursuant to Contracts 20A, 29, and 07. Thus, for each contract, formation of a collusive conspiracy is a central issue for plaintiffs' inchoate and substantive FCA claims.

[84] The record contains evidence from which the jury could have found these facts by a preponderance of the evidence.

89.) After the joint venture had won the contract, Bilfinger & Berger sent an invoice for $1,026,000 to Holzmann seeking payment for its performance of the bargain; Holzmann paid the invoice in full. (*Id.* at 90-94; Pl.'s Exs. 17, 18.)

In or around August 1988, Schmidt met with Constantine Iatrou of Archirodon, Fuller's parent company, and offered to compensate Fuller if it would refrain from bidding on Contract 20A. (Mar. 21, 2007 AM Tr. at 15-16.) Iatrou ultimately signed a written agreement under which the joint venture would pay Fuller a fee—3% of the contract price less the value of a proposed subcontract worth at least $25 million, or alternatively, 5% of the contract price—not to tender a bid on Contract 20A.[85] (*Id.* at 19-20, 24, 26; Pl.'s Ex. 1.) The document further provided that the joint venture would reciprocate by not bidding on another contract—either Contract 29 or Contract 23—to help assure Fuller would be the winning bidder. (Mar. 21, 2007 AM Tr. at 28-29.) In December 1988, Iatrou met again with Schmidt, and this time, Anderson joined them. (*Id.* at 40-44.) During the meeting, Anderson handwrote an addendum to the original agreement, making specific references to it, that set Fuller's fee at $3 million. (*Id.* at 43, 45.) Holzmann ultimately paid Archirodon through one of the latter's subsidiaries. (*Id.* at 77-78.)

i. HII

Based on the evidence, the jury could reasonably have found that HII, through the acts of its agents,

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[85] Thus, contrary to BHIC and HUK's assertion, the evidence *did* support the existence of a "schlepper"—a third potential bidder paid not to bid—on Contract 20A. (*See* Motion Eight at 14.)

Roy Anderson and Bill Harbert, conspired to submit false claims on Contract 20A and knowingly caused false claims to be presented and made.

Both Roy Anderson and Bill Harbert had authority to act for HII as to Contract 20A. In the joint venture's 1988 tender documents on Contract 20A, HII represented that it—not HIE—owned a majority stake in the joint venture, and it held out Roy Anderson as its vice-president. (Pl.'s Exs. 109, 162.) Bill Harbert, HII's president at the time, had sent Anderson to London some years before to work on HII's behalf. (Pl.'s Ex. 250.) In 1988 and 1989, he signed powers of attorney authorizing Anderson, "without reservation," to represent HII in bidding for international construction projects. (Pl.'s Ex. 652A-D.)

Armed with this authority, Anderson participated extensively in the instant conspiracy. For example, at the December 1988 meeting between Schmidt and Iatrou, Anderson personally drafted an addendum to the original bid-rigging agreement. (Mar. 21, 2007 AM Tr. at 40-45.) Along with his signature on the addendum,[86] the document's explicit references to language in the original agreement—a copy of which was present at the meeting—strongly support Anderson's awareness of its contents and import. (*See id.* at 43-45, 48.) The jury could have found that in drafting the addendum to this collusive agreement, and in ratifying it with his signature, Anderson,

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[86] Iatrou testified that Anderson later crossed out his signature, and that he and Schmidt referred to Anderson in their correspondence by various nicknames because the parties wished to conceal Anderson's involvement in the bid-rigging agreement. (*See* Mar. 21, 2007 AM Tr. at 48- 49, 60, 66-67, 69.)

acting for HII, willfully joined and advanced the conspiracy.[87]

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[87] HII appears to argue that because Fuller had already performed its part of the bargain (by not bidding in August 1988) and had been disqualified from the second round of bidding, Anderson could not have joined the conspiracy in December. (Motion Two at 3-4. *See also* Reply Two at 3.) Yet it is hornbook law that one may join a conspiracy after the agreement's inception, (*see* May 4, 2007 AM Tr. at 59-61), and HII offers no authority for its novel twist on this rule—that one may join a conspiracy after the agreement's inception *only* so long as it remains wholly executory.

Moreover, there was circumstantial evidence from which the jury could have concluded that Anderson joined the conspiracy much earlier—that he represented HII at the May 1988 meeting where Schmidt originally proposed a collusive arrangement. Initially, Kadenbach "was sure" a "Harbert" representative attended, (Mar. 22, 2007 AM Tr. at 82), but he later conceded his certainty rested on Schmidt's statement that "somebody" from "Harbert" was present, (id. at 103-04). Nonetheless, considering that HII was the majority partner in the joint venture for which Schmidt sought to secure Contract 20A, the jury could reasonably have concluded that someone from HII was, indeed, present. Prior to that meeting, Bill Harbert, HII's President, had sent Anderson to London to work on HII's behalf. (Pl.'s Ex. 250.) He had also signed powers of attorney authorizing Anderson, "without reservation," to represent HII in bidding for international construction projects. (Pl.'s Exs. 652A-D.) Anderson attended the Contract 20A reconciliation meeting with Jones in June 1988, and along with John Ollis of Jones, he determined the final markup. (Mar. 26, 2007 PM Tr. at 29-30; Apr. 13, 2007 AM Tr. at 38, 48; Apr. 16, 2007 PM Tr. at 18.) In August and December 1988, Anderson signed tenders on Contract 20A as HII's vice-president. (Pl.'s Exs. 109, 162.) In light of Anderson's explicit status as HII's point-man in Europe for international contracting and his attendance at the December 1988 renegotiation with Fuller, it would be reasonable to infer that if a HII representative attended the May meeting, it would have been Anderson.

From this same evidence, the jury could reasonably have concluded that Anderson had actual knowledge of the conspiracy to rig bids on Contract 20A.[88] Additionally, Bill Harbert's 1990 pocket calendar, in which he documented the precise amounts of the five Fuller payoff tranches, reflects his knowledge.[89] (*See*

Further, the jury could reasonably have concluded that Anderson was contemporaneously aware of and acted on Schmidt's original, August 1988 agreement with Fuller. Before Schmidt met with Fuller, Anderson and his team of estimators prepared two separate bid packages, one 3.5% higher than the other, and sent them both to Cairo. (Apr. 12, 2007 PM Tr. at 54-56.) After Schmidt and Iatrou agreed that Fuller would not bid, Anderson instructed that the higher bid be submitted. (*See id.*) While defendants claim this last-minute adjustment to the joint venture's bid was designed to account for fluctuations in steel prices, the jury could reasonably have inferred that Anderson ordered the higher bid submitted once Schmidt told him Fuller was onboard.

[88] As this Court instructed the jury, the False Claims Act knowledge standard also embraces deliberate ignorance and reckless disregard. (See May 4, 2007 AM Tr. at 48.) The jury could have concluded Anderson satisfied the standard for reckless disregard when he authorized payment on inflated pre-bid invoices and wire transfers from the joint venture to HUK that disguised payoffs to co-conspirators, and when he signed the sale-leaseback agreement and invoices that concealed some of the joint venture's profits. (*See* Apr. 9, 2007 PM Tr. at 108-09; 118-19; Apr. 11, 2007 PM Tr. at 119, 126-27, 131-33; Joint Stipulation 1.)

[89] In concluding Bill Harbert had knowledge of the conspiracy, the jury could also have considered his 1985 letter to his brother lamenting increased competition on Egyptian construction projects, (Pl.'s Ex. 249); his establishment in 1986 of business contacts with Schmidt, the conspiracy's ringleader, (Pl.'s Ex. 251); and his wire transfers to and from what plaintiffs colorfully referred to as the Holzmann "slush fund," an account through which payoffs for Contracts 20A and 29 passed, (Pl.'s Exs. 21, 22, 365).

Pl. Ex. 5.) But for HII's participation in the conspiracy, claims submitted by the joint venture on Contract 20A would not have been false. *See Hess*, 317 U.S. at 543-45. Hence, the jury could reasonably have concluded that HII knowingly[90] caused false claims to be made and presented to the government on Contract 20A.[91] Moreover, once the jury concluded HII had willfully joined the bid-rigging conspiracy, it could properly have held HII liable for its co-conspirators' knowing creation and presentation of false claims. *See Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983). (*See also* May 4, 2007 AM Tr. at 59, 62.)

Thus, there was evidence in the record from which the jury could reasonably have found HII liable on Contract 20A.

ii. HC

Likewise, the jury could reasonably have found that HC, imbued with the knowledge of its agent, Bill Harbert, conspired to submit false claims on Contract 20A.

Bill Harbert served as HC's president until July 1990, after which he became vice chairman of its

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[90] The Court instructed the jury on imputed knowledge, (May 4, 2007 AM Tr. at 54), and in light of the other evidence, the jury could reasonably have concluded that Anderson, at least, acquired knowledge of the conspiracy (and consequently, the claims' falsity) while acting within the scope of his duties as HII's representative on Contract 20A, (*see, e.g.*, Pl.'s Exs. 109, 162, 250, 652A-D).

[91] After imputing Anderson's knowledge to HII, the jury could also have reasonably concluded that HII's provision of bonding support to the joint venture enabled the joint venture to bid on Contract 20A and was thus a but-for cause of its submission of false claims. (*See Pl.'s* Exs. 109, 307.) *See infra* note 95 (discussing plaintiffs' "caused to be presented" theory).

board of directors. (Pl.'s Ex. 574A.) He also served as its chief operating officer from August 1984 to December 1991. (Id.) As explained above, the jury could have concluded from Bill Harbert's 1990 pocket calendar notes that he gained knowledge of the bid-rigging on Contract 20A while serving as a fiduciary and manager of HC.[92] Based on the Court's instruction, the jury could have imputed this knowledge to HC.[93]

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[92] Further, given that Harbert originally sent Anderson to London to pursue international construction contracts and that Anderson was one of Harbert's two "key deputies," (Apr. 24, 2007 AM Tr. at 11), the jury could reasonably have inferred that Anderson acted with Harbert's blessing or at his behest.

[93] HC insists that no evidence indicates Harbert acquired this knowledge—or took any action—"while acting within the scope of his . . . employment" or while "wearing his HC 'hat.'" (Motion Three at 15, 18.) But the jury could reasonably have concluded that where, as here, a single person held managerial or fiduciary positions with multiple, interrelated corporate entities, whose interests were in some respects aligned, he could wear more than one "hat" at a time. Plaintiffs' counsel advanced this very theory to the jury, (Mar. 20, 2007 AM Tr. at 72, 84-85; May 3, 2007 PM Tr. at 9-10), and the jury evidently agreed.

Relatedly, HC contends Harbert was an adverse agent who pursued bid-rigging in his own personal interests and against those of HC. (Motion Three at 17-20.) As the Court explained above, however, *see supra* part II.D.3, the "adverse agent" exception "applies only to fraud against the corporation, not to fraud *on behalf of* the corporation." *BCCI Holdings, S.A. v. Clifford*, 964 F. Supp. 468, 478 (D.D.C. 1997) (Green, J.). HC's adverse agent theory appears to rest on its characterization of the sale-leaseback transaction used to conceal joint venture profits on Contract 20A: defendants asserted throughout trial that Bill Harbert engineered this scheme to retaliate against his brother, John, by depressing HIE's apparent value and then buying HII's share in HIE at a bargain price. (*See* Motion Three at 17.) Absent evidence that Harbert knew in September 1990,

Further, the jury viewed several pieces of evidence from which it could have found HC willfully advanced the conspiracy by rendering services and providing support crucial to HIE's securing (and submitting false claims on) Contract 20A.[94] Most significantly, in an internal workpaper, HC's independent auditors wrote that "[a]ccording to [HC]'s management, HIE depends on HC to provide its credit facilities, security clearance and bonding capacity. It would not be

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when the transaction was initiated, that HII would later sell him its share in HIE, this theory is largely speculative. Further, for the adverse agent doctrine to apply, many courts hold that the agent's interests must be completely adverse to the principal's in a given transaction. *E.g.*, *Pereira v. Aetna Cas. & Sur. Co.*, 186 F.3d 196, 207 (2d Cir. 1999); *Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768, 773 (4th Cir. 1995). *But cf. Baena v. KPMG LLP*, 453 F.3d 1, 7 (1st Cir. 2006) (agent's conduct not imputable where "wrongdoing is done primarily for personal benefit") (emphasis added). Here, while HC did not receive any profits from Contract 20A *directly*, the jury could reasonably have concluded that it nonetheless reaped benefits through the conspiracy's enrichment of its subsidiaries, HII and HIE. (*See* Apr. 10, 2007 PM Tr. at 60-68; Joint Stipulation 1.) Moreover, as explained below, to the extent Harbert's interests may have *become* adverse to HC's *after* he acquired knowledge of the conspiracy, the jury need not have imputed Harbert's actions to HC along with his knowledge. Instead, it could reasonably have concluded that HC advanced the conspiracy through its own knowing provision of services to HIE.

[94] HC repeatedly cites to this Court's Memorandum Opinion & Order of March 14, 2007, for the proposition that it must have performed "fraudulent" actions in furtherance of the conspiracy to be held liable. (*See, e.g.*, Motion Three at 20. *See also* Reply Three at 17.) HC misconstrues the Court's opinion, which did not presume to judicially amend the False Claims Act. (*See* Mem. Op. & Order of Mar. 14, 2007 [716] at 8.) The Act itself does not specify that a defendant must perform "fraudulent" acts to be liable, and HC cites no case law or other authority that supports this interpretation.

possible for HIE to [continue] operating as it has [been] . . . without the total support of HC and HII." (Pl.'s Ex. 299.) This language appears in a section entitled "Matters for Attention of Partner." (*Id.*) The jury could reasonably have inferred that the author, a lower level employee, would accurately report the client's representations in a memorandum to his superior, lest the partner be embarrassed by subsequent reliance on the information. Further, the jury could reasonably have credited HC's own representations to its auditor; it could thus have concluded the services HC provided were essential to HIE's performance of—and submission of false claims on—Contracts 20A and 07.

Three other exhibits bolster this conclusion. First, in a letter to HC's auditors, HC's vice president and general counsel indicated that HC retained some connection to HIE even after HII sold its interest to Bill Harbert in 1991, and he characterized HC's continuing bonding obligations on "'HIE jobs' contracted in HII's name" as "significant." (Pl.'s Ex. 307.) Again, the jury could have given great weight to HC's representations to its auditors and thus concluded that support from HC, whose assets far exceeded those of HIE, was crucial to HIE's ability to bid for and perform the subject contracts. Second, plaintiffs presented two letters to Southtrust Bank drafted by Margaret Russo, HC's treasurer's assistant, whose duties included "coordinat[ing] all of the bank accounts for any of the Harbert companies with Southtrust." (Apr. 4, 2007 PM Tr. at 22; *see* Pl.'s Exs. 269, 448.) The letters, written on HC letterhead in 1989 and 1991, change the signature authority and mailing address on a Harbert-Jones joint venture bank account used for Contract 20A. (Pl.'s Exs. 269, 448.) According to Terri Mashburn, bookkeeper for HIE, "anytime

[a 'Harbert company' employee] needed to change anything, we would go through Margaret and she would take care of all the paperwork." (Apr. 4, 2007 PM Tr. at 22.) Based on these letters, the jury could reasonably have concluded that HC knowingly advanced the conspiracy by providing financial management services to HIE, without which HIE could not have submitted false claims on Contract 20A.

Based on this evidence, the jury could have found that HC willfully joined and aided a conspiracy to rig bids on Contract 20A. Once it had so concluded, it could properly have held HC liable for its co-conspirators' knowing creation and presentation of false claims. *See Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983). (*See also* May 4, 2007 AM Tr. at 59, 62.) Moreover, the jury could also have concluded that by providing essential services to HIE, HC, itself, knowingly caused false claims to be made and presented on Contract 20A.[95]

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[95] HC attacks plaintiffs' "caused to be presented" theory as "novel," but the FCA clearly sets forth this basis for liability. *See* 31 U.S.C. § 3729(a)(1) (2008). Various authorities have explicitly recognized this theory as legitimate under the statute. *See, e.g., United States ex rel. McCready v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114, 120 (D.D.C. 2003) (Lamberth, J.); *United States ex rel. Atkinson v. Penn. Shipbuilding Co.*, 255 F. Supp. 2d 351, 405 (E.D. Pa. 2002). If the defendant satisfies the FCA's knowledge standard, ordinary causation principles apply—his conduct must be at least a substantial factor in causing, if not the but-for cause of, submission of false claims. *United States ex rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235, 244 (3d Cir. 2004). HC's contention that this theory of liability conflicts with the Supreme Court's analysis in *United States v. Bestfoods*, 524 U.S. 51 (1998), is a non sequitur. (*See* Motion Three at 23-24.) *Bestfoods* discusses the conditions under which a plaintiff may hold a parent corporation liable for its subsidiary's conduct. 524 U.S. at 61. Here, under section 3729(a)(1),

iii. BHIC

Similarly, the jury could reasonably have found that BHIC, armed with its agents' knowledge, conspired to submit false claims on Contract 20A and also knowingly caused such claims to be made and presented.

At various times, Bill Harbert served as BHIC's president, CEO, and chairman. (*See* Mar. 30, 2007 AM Tr. at 14; Pl.'s Ex. 263.) The Court has discussed his knowledge of and involvement in the conspiracy above.[96] Though BHIC correctly states the rule that an agent's knowledge may be imputed to the principal only when he acquires that knowledge in the course of his agency, *see BCCI Holdings, S.A. v. Clifford*, 964 F. Supp. 468, 478 (D.D.C. 1997) (Green, J.), it grossly oversimplifies this rule's application,

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plaintiffs would hold HC liable for its own conduct—that is, for its knowing provision of resources necessary to HIE's submission of false claims.

Furthermore, both plaintiffs clearly alleged a violation of section 3729(a)(1) in their complaints. (*See* Relator's Fifth Amended Complaint [687] ¶¶ 92-93; Government's Third Amended Complaint [419] ¶¶ 120-22.) Relator's complaint alleges facts that support plaintiffs' "caused to be presented" theory. (Relator's Fifth Amended Complaint [687] ¶¶ 14-18.) Similarly, while the government's complaint admittedly focuses on an alter ego theory, it does allege some facts supporting a "caused to be presented" theory. (Government's Third Amended Complaint [419] ¶¶ 23, 25.) HC's expressed surprise, if genuine, is therefore unwarranted.

[96] Additionally, defendant Anderson claimed to be "President and CEO" of BHIC's "international operations," (Pl.'s Exs. 389, 568A), and held a power of attorney for BHIC from May 12, 1992 onward, (*see* Mar. 30, 2007 AM Tr. at 61-62; Pl.'s Ex. 386). The jury could reasonably have inferred that after this date, Anderson acted for BHIC as well as for HII and/or HIE.

(*see* Reply Four at 3). First, though Harbert may have *initially* learned of the bid-rigging prior to BHIC's formation, he thereafter acquired additional knowledge of the conspiracy as it progressed. For example, after BHIC commenced operation, Harbert received—and necessarily, acquired knowledge of—clandestine payments associated with Contract 20A. (*See* Joint Stipulation 1; Pl.'s Exs. 467, 481.) Second, and more to the point, BHIC emerged from the reorganization and renaming of BLH Enterprises and was, like its predecessor, wholly owned by Harbert. (Pl.'s Ex. 263.) Plaintiffs offered evidence that Harbert intended this new company to hold ownership in and provide support services to HIE, (*see* Pl.'s Exs. 263, 682; Mar. 30, 2007 AM Tr. at 13-14), the entity to which Contracts 20A and 07 had been assigned and which actually made and submitted numerous false claims, some after 1992. Thus, the jury could reasonably have concluded that BHIC's very *raison d'etre* was to facilitate and further the ongoing conspiracy through aid to HIE.

The jury could also have imputed Tommy Kitchens' knowledge of the conspiracy to BHIC. Kitchens served as BHIC's executive vice president from its inception. (See Mar. 30, 2007 AM Tr. at 64.) When he resigned in 1995, having failed to extract a $1 million "bonus" from Bill Harbert, he wrote Harbert a letter in which he detailed the "accomplishments of Contract 20A." (Mar. 30, 2007 AM Tr. at 69-71.) He identified the exact amounts of bid-rigging payoffs routed through Holzmann, profits concealed through the sale-leaseback transaction, and profits "deferred" to Contract 27. (*See id.* at 71; Pl.'s Ex. 23.) *See also infra* note 149. BHIC contends the letter demonstrates only "Kitchens' knowledge of various financial transactions," (Reply Four at 5), but the jury could easily have read between the lines. From Kitchens'

bitter tone, his reference to transactions otherwise identified as disguised payoffs and concealed profits as "accomplishments," and his knowledge of specific monetary values, the jury could reasonably have inferred that as BHIC's executive vice president, Kitchens actively worked to advance the conspiracy and thus expected to share in its profits.

Imputing Harbert and/or Kitchens' knowledge to BHIC, the jury could then have concluded that BHIC willfully joined the conspiracy after its inception. Specifically, BHIC provided administrative and accounting support to the joint venture for contracts which it knew had been secured through unlawful collusion. (Apr. 4, 2007 PM Tr. at 26-29, 94, 101, 102.) BHIC managed joint venture bank accounts, prepared joint venture financial records, and handled home office invoicing—all in regard to Contract 20A. (*Id.* at 26-29, 77-99.) The jury could reasonably have found that these "ministerial acts" enable the joint venture to perform and submit false claims on Contract 20A, thus advancing the conspiracy.[97] And having concluded that BHIC had knowingly participated in the conspiracy, the jury could properly hold BHIC liable for its co-conspirators' knowing creation and presentation of false claims. *See Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983).

iv. HUK

As with its co-defendants, the jury could reasonably have found HUK willfully joined the conspiracy to rig bids on Contract 20A. The law imputes to a corpo-

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[97] Moreover, it could reasonably have deemed these services *essential* to the joint venture's ability to perform, and submit false claims, on Contract 20A, and it might thus have concluded that BHIC caused these false claims to be made and presented.

ration the collective knowledge of its employees and agents, *Phillip Morris USA, Inc.*, 449 F. Supp. 2d at 893-95, and when aggregated, HUK's agents' individual knowledge embraces the full bid-rigging conspiracy.

First, at a joint venture bid reconciliation meeting held in June 1988 at HUK's offices, Ian Young, a HUK employee who ultimately signed the cover letter on the joint venture's Contract 20A bid, served as chief estimator for the Harbert side. (Mar. 26, 2007 PM Tr. at 11-13; Pl.'s Ex. 162; Apr. 9, 2007 PM Tr. at 102-03.) According to Carl Nagel, a Jones estimator, Young and his team engaged in "arm twisting" during the meeting. (Mar. 26, 2007 PM Tr. at 43.) Without identifying line items they felt had been miscalculated, they insisted on raising the bid above Nagel's $95.2 million estimate, and though he acceded to their demands, Nagel never doubted his original calculations. (*Id.* at 44-45.)

HUK attributes the pressure Nagel described to a difference of opinion on construction methods. (Motion Four at 10.) Indeed, Nagel himself acknowledged that reasonable and experienced estimators could hold such differing opinions. (Mar. 27, 2007 AM Tr. at 29.) But while the Harbert team's "arm twisting" might thus bear an innocent explanation, the jury was entitled to view it with skepticism in light of the other evidence of bid-rigging.[98] As explained above,

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[98] In essence, HUK merely posits that another—in its opinion, better—explanation of the facts exists. But at this stage in the litigation, the relevant question is whether the view adopted by the jury in reaching its verdict was at all *reasonable*. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). The Court must review the record as a whole, disregarding all evidence favorable to HUK which the jury was not required to

the jury heard evidence of a collusive agreement: only Fru-Con and the joint venture would bid, and Fru-Con's bid would exceed the joint venture's, however high, to ensure the joint venture would secure the contract. The jury also heard expert testimony on how, according to economic theory, parties to such an agreement typically behave: a collusive agreement's inherent purpose is to raise prices, and to realize benefits from their agreement, managers who form a cartel must exert influence on their companies' price-setting processes. (*See, e.g.*, Apr. 5, 2007 PM Tr. at 84, 94-95, 138-40.) Under the circumstances, the jury could reasonably have construed Young's "arm twisting" as evidence of such influence. At the very least, they could have inferred he knew the joint venture's bid would be artificially inflated.[99]

HUK's managing director, Colin Towsey, also testified to HUK's direct participation in the conspiracy, as a conduit for payoffs to co-conspirators on Contract 20A. (*See* Apr. 9, 2007 PM Tr. at 118-124; Apr. 4, 2007 PM Tr. at 38-66.) Towsey received invoices for engineering services purportedly requested by and rendered to HUK in Turkey, Germany, and elsewhere. (*Id.* at 118-20. See also Pl.'s Exs. 435, 438.) Though Towsey recognized HUK had neither ordered nor received such services—nor had authority to

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believe, and must draw all reasonable inferences in favor of the jury's verdict. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000).

[99] Defendants insist plaintiffs offered no evidence that those preparing the bids knew of the conspiracy. (*E.g.*, Motion Four at 25.) But as explained herein, there was evidence from which the jury could reasonably have concluded that both Young and Anderson knew of the conspiracy and consequently nudged the joint venture's August and December bids upwards.

do so under its services agreement with HIE—he nonetheless paid the invoices at Tommy Kitchens' instruction. (Apr. 9, 2007 PM Tr. at 120-21.) As plaintiffs point out, Towsey denied knowledge of the conspiracy, but the jury need not have found his denials credible. Regardless, however, it could reasonably have found Towsey at least knew false invoices were used to make unjustified payments related to Contract 20A.

There was also evidence from which the jury could have imputed defendant Anderson's knowledge of these invoices' true nature to HUK. HUK protests that Anderson lacked authority to act for it and thus was not its agent, but its analysis primarily addresses the *actual* authority that flows from a formal agency relationship. (Motion Four at 11-12.) Even if Anderson lacked actual authority, plaintiffs introduced evidence of his *apparent* authority. Apparent authority arises from "'written or spoken words or any other conduct of the principal which, reasonably interpreted, causes [a] third person to believe that the principal consents to have [an] act done on his behalf by the person purporting to act for him.'" *DBI Architects, P. C. v. Am. Express Travel-Related Servs. Co., Inc.*, 388 F.3d 886, 890 (D.C. Cir. 2004) (quoting Restatement (Second) of Agency § 27 (1958)). An "agent cannot by his own acts imbue himself with apparent authority." *Evans v. Skinner*, 742 F. Supp. 30, 33 (D.D.C. 1990) (Richey, J.) (quoting *Fennell v. TLB Kent Co.*, 865 F.2d 498, 503 (2d Cir. 1989)). But such authority can arise when one holds himself out as an agent, and the putative principal unreasonably fails to deny or ratifies these representations. *See DBI Architects*, 338 F.3d at 894.

Towsey testified that Anderson—and Anderson alone—hired him to work for HUK and informed him when he was appointed managing director. (Apr. 9, 2007 PM Tr. at 75-76, 84-85.) According to Towsey, Anderson maintained an office at HUK's London headquarters, and HUK designated him as a signatory on its bank account. (*Id.* at 78, 82.) From these facts,[100] the jury could reasonably have concluded that HUK either authorized Anderson to act on its behalf or knowingly permitted him to do so.[101]

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[100] Plaintiffs also presented evidence that HUK, a nominally independent corporation, was in reality HIE's London office. Bookkeeper Terri Mashburn testified that HIE and HUK were treated interchangeably in HII's general ledger, and that "depositing [] into HIE's account was in effect the same thing as depositing [] into [HUK's] account because they were the same general ledger books." (Apr. 5, 2007 AM Tr. at 34-35.) She viewed HUK as "just one of the offices for HIE." (*Id.* at 34.) The jury also heard testimony that Anderson, HIE's president, ran the "Harbert" London office shared by HUK. (*E.g.*, Apr. 13, 2007 AM Tr. at 37-38.) If the jury accepted that HUK was but "one of the offices for HIE," this conclusion would augment the case for Anderson's role as HUK's agent.

[101] HUK argues that Anderson was not its agent—and thus the jury could not impute his knowledge—because it exerted no control over him. (Reply Four at 9.) In the classical formulation, an agency relationship exists where the principal authorizes the agent to act on his behalf, and the agent subjects himself to the principal's control. Restatement (Third) of Agency § 1.01 (2006). When agency rests on apparent, rather than actual, authority, however, the principal need not, and usually does not, control the agent because their relationship arises not from mutual assent but from equitable principles: a principal who intentionally or negligently creates in another an appearance of authority on which third parties reasonably rely may not later deny such authority existed. *See id.* § 3.03 cmt. b. Nonetheless, plaintiffs offered some evidence from which the jury might have found HUK *did* exert some control over Anderson. Bill Harbert owned

When Towsey received the false invoices, he looked to Roy Anderson, the man who had hired him to run HUK and who had initially served as his sole point of contact, for guidance on how to proceed. (*Id.* at 117-18.) Thus, the jury could reasonably have found that Anderson learned HUK had received the invoices, and directed Towsey to contact Kitchens, in his role as HUK's agent. Anderson would have recognized these invoices as cover for payoffs to co-conspirators, and the jury could properly have imputed this knowledge to HUK.

Thus, after imputing the aggregate the knowledge acquired by Young, Towsey, and Anderson in the course of their agencies, and considering its role as a conduit for payoffs, the jury could reasonably have concluded that HUK willfully joined and participated in the bid-rigging conspiracy. It could then have deemed HUK liable for its co-conspirators' knowing creation and presentation of false claims. *See Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983).

b. Damages

As set forth above, *see supra* part II.G.1, the proper measure of damages in this FCA action was "the difference between what the United States paid and what it would have paid had there been no bid-rigging agreement." (May 4, 2007 AM Tr. at 65 (final jury instruction).) Thus, in calculating damages,

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49% of HUK and served as one of its two directors. (Apr. 9, 2007 PM Tr. at 86; Mar. 30, 2007 AM Tr. at 14-15.) It was he who originally sent Anderson, one of his "two key deputies" to London, where Anderson hired HUK's initial employees and installed himself in HUK's offices. (See Pl.'s Ex. 250; Apr. 24, 2007 AM Tr. at 11; Apr. 9, 2007 PM Tr. at 75-76.) The jury could thus have concluded HUK, through its director, Harbert, controlled Anderson.

the jury's first task was to determine "what [the government] would have paid had there been no bid-rigging agreement.[102] (*See id.*) Because each contract

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[102] For the government to have suffered damages, of course, this value must exceed what the government actually paid. For three reasons, defendants contend it did not.

First, defendants point out that before forming its agreement with Harbert-Jones, Fru-Con had independently determined it could not profitably perform Contract 20A and thus intended to bid high to avoid securing the contract. (Motion Two at 4; Motion Four at 25.) When Kadenbach met with Schmidt and agreed that Fru-Con would bid high in exchange for 2-3% of the final contract price, he may have known his company would bid high, regardless. But *Schmidt* did not. Absent their agreement, Harbert-Jones would have believed Fru-Con was a viable competitor striving to submit the lowest bid. Having secured Fru-Con's cooperation, it could safely raise its own bids (in August and December 1988) to increase its expected profits, knowing Fru-Con would not undercut them. At the very least, to break even, Harbert-Jones would need to raise its bids to cover the cost of the promised payoff to Fru-Con. Hence, Fru-Con's secret intent to bid high is irrelevant to whether the government suffered damages.

Second, defendants note that Fuller could not obtain bonding and was disqualified from further participation after failing to bid in August. (Motion Four at 24.) When Iatrou agreed that Fuller would refrain from bidding in exchange for either 3% of the contract price less the value of a proposed subcontract, or 5% of the contract price, he may have known that Fuller *could not* find bonding and thus could not bid. But again, *Schmidt* did not. Without this agreement, Harbert-Jones would have believed Fuller was a viable competitor. With it, Harbert-Jones could increase its August bid, comfortable in the knowledge that Fuller would not undercut it, and if nothing else, the promised payoff to Fuller raised the joint venture's break-even bid value.

Finally, defendants assert that even if the conspiracy had an inflationary effect on the August 1988 bids, this did not transfer to the December bids. (Motion Four at 25.) When Harbert-Jones and Fru-Con's August bids came in at more than double the $58

was unique, no perfectly comparable data—the winning bid for an identical project, produced under identical conditions, absent collusion among the bidders—was available.[103] Hence, due to defendants'

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million engineer's estimate, AMBRIC ordered a new engineer's estimate, which yielded a figure of $120 million. (Apr. 3, 2007 PM Tr. at 60, 70.) AMBRIC then reduced the scope of work and lowered its estimate to $109 million, a decrease of 9.2%. (*Id.* at 68-69, 70.) Because Harbert-Jones reduced its bid by 11.6% from August to December, defendants argue, any inflation must have been eliminated. (Motion Four at 25 n.13.) By this calculation, the August bid could have incorporated no more than $4 million in padding. (*Id.*) They offer no basis for this assumption, and indeed, the evidence suggests otherwise. Had Harbert-Jones secured Contract 20A at a price of $129 million, it would have owed 2-3%—or $2.58-3.87 million—to Fru-Con and at least another 3%—or $3.87 million—to Fuller. If the $129 million bid included only $4 million in padding, these payoffs would have eaten into the joint venture's profits by at least $2.45 million. The jury evidently discounted this illogical chain of reasoning.

[103] Defendants argue that plaintiffs were required to show that the joint venture did not satisfactorily perform its contractual obligations or alternatively, "evidence of a lower bid by a viable candidate." (Motion Two at 6 (citing *United States ex rel. Ervin & Assocs. v. Hamilton Secs. Group*, 370 F. Supp. 2d 18, 56 (D.D.C. 2005)).) But the authorities on which they rely are factually distinguishable n certain, crucial respects. In *Ervin*, Judge Oberdorfer examined the Fourth Circuit's decision in *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003), in which the defendants had allegedly gained an unfair advantage over other bidders by failing to disclose conflicts of interest. *See* 370 F. Supp. 2d at 54-55. There, the Court of Appeals concluded the plaintiffs had failed to prove damages because they had not shown harm to the government. 352 F.3d at 922-23. The plaintiff "presented no evidence that the government did not get what it paid for or that another firm could have performed the work for less." *Id.* at 923.

Unlike this case, neither *Ervin* nor *Harrison* involved collusive bid-rigging. Collusion among bidders, alone, does not preclude the plaintiff from presenting "evidence of a lower bid by a viable

collusion, the jury could not precisely determine what the government would have paid on Contract 20A under competitive conditions, and it was left to "make a just and reasonable estimate of the damage based on relevant data." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

Throughout the trial, plaintiffs presented several "relevant data" to the jury.

First, the jury heard evidence of performance cost estimates for Contract 20A by AMBRIC, Jones, and Fuller. Before August 1988, AMBRIC engineers estimated Contract 20A at $136.8 million, then $90 million, and finally $58 million. (Apr. 3, 2007 PM Tr. at 60; Apr. 4, 2007 AM Tr. at 21, 78-79.) After Harbert-Jones and Fru-Con's unexpectedly high August bids, AMBRIC ordered a new engineer's estimate, which came in at $120 million. (*Id.* at 60, 70.) AMBRIC then lowered this estimate to $109 million based on the reduced scope of work. (*Id.* at 68-69, 70.) Prior to the reconciliation meeting with the Harbert team, Carl Nagel of Jones prepared an independent estimate of $95.2 million.[104] (Mar. 26,

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candidate." But where, as here, *all viable candidates* have allegedly participated in the conspiracy—and the collusive agreement, by its terms, ensures all bids are inflated—no such evidence will exist. Hence, *Ervin's* language is inapposite, and plaintiffs need not have presented evidence of a lower, viable bid. "Any other rule . . . would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages [incalculable]." *Bigelow*, 327 U.S. at 264.

[104] This estimate assumed that inexpensive, "trench box" shoring would be used in some areas but that more costly and reliable soldier pile lagging would be used in others. (*Id.* at 36- 40.) It also allowed for "risk and profit." (*Id.* at 35.) During the recon-

2007 PM Tr. at 31.) Though Fuller joined the conspiracy and did not ultimately bid, it prepared an estimate for Contract 20A of approximately $80 million.[105] (Mar. 21, 2007 AM Tr. at 80-82, 94. *See also* Mar. 22, 2007 AM Tr. at 25-35.)

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ciliation meeting, Nagel reluctantly elevated his estimate to $103 million at the Harbert team's insistence. (*Id.* at 41-44.)

For several reasons, defendants argue Nagel's original estimate "cannot properly be considered as the measure of what another qualified contractor would have bid for Contract 20A." (Motion Two at 13-15.) Yet nothing indicates the jury simply adopted this measure wholesale—indeed, defendants' own calculations demonstrate otherwise. (*Id.* at 7.) Whatever the Nagel estimate's flaws as a proxy for what the government would have paid in a competitive environment, such a fairly and conservatively computed estimate would have some influence on a competitive bidder's final bid. It was thus relevant evidence which the jury could properly consider in calculating damages.

[105] Defendants decry this evidence as wholly irrelevant because as of August 1988, Fuller had no intention of submitting this bid, and because Fuller's inability to secure bonding would have rendered its bid unacceptable. (Motion Two at 9-11.) To be relevant, however, evidence need only have some tendency to make any material fact more or less probable. Fed. R. Evid. 401. Plaintiffs' witnesses' testimony established that Fuller had experience with similar construction projects, having secured and competently performed Contract 25, and that its Cairo team compiled its estimate for Contract 20A. (Mar. 21, 2007 AM Tr. at 79-81; Apr. 3, 2007 PM Tr. at 58-59.) That Fuller could not, in the end, obtain bonding does not impugn its estimators' calculations. Its estimate is simply evidence of what experienced estimators—such as Harbert-Jones' Alf Hill—might have compiled had they anticipated unfettered competition among the three pre-qualified bidders. In this sense, it is "demonstrative of what Harbert-Jones 20A . . . would have tendered absent collusion." (*Contra* Motion Two at 10.) Defendants' objections pertain only to the weight of the evidence—which the jury was entitled to assess for itself.

Second, the jury heard evidence of another, relevant bid. As Dr. Gould explained, Contract 20A was a scaled-down version of the defunct Contract 20,[106] on which procurement occurred in 1984-85 and on which Harbert-Jones had bid $61 million. (Apr. 3, 2007 PM Tr. at 51-52.)

Third, the jury heard evidence of the joint venture's actual costs and profits. Plaintiffs' expert Terry Musika testified that Harbert-Jones booked $30 million in profits, concealed another $25 million through various methods, and incurred $62 million in costs on Contract 20A. (Apr. 10, 2007 AM Tr. at 54-97.) Plaintiffs also offered evidence that profits on international construction contracts of this type typically fell in the 6-15% range. (*See, e.g.*, Mar. 21, 2007 AM Tr. at 82-83; Mar. 22, 2007 AM Tr. at 36, 63; Mar. 28, 2007 AM Tr. at 60.)

In their closing arguments, plaintiffs proposed how the jury might translate these data into "a just and reasonable estimate of the damage." First, they suggested the jury calculate a plausible, competitive bid using cost and typical profits data, then subtract this value from the $107 million the government actually paid. (*See* May 1, 2007 PM Tr. at 72-74.) As explained above, the jury could have reasoned that if average profits were 6-15%, then a successful competitive bidder's final costs typically account for 85-94% of what the government ultimately pays. *See supra* part II.G.1. By this logic, defendants' final costs ($52 million) would equal 85-94% of a successful, competitive

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[106] After the winning bidder pulled out, and the runner-up commenced and then stopped work, USAID reevaluated the project, attempted to mitigate newly materialized risks, and reduced the scope of work. (Apr. 3, 2007 PM Tr. at 50-51.) It then issued a revised tender request, Contract 20A. (*Id.* at 51-52.)

bid on Contract 20A. Second, plaintiffs proposed the jury adopt Nagel's "free-of-influence" $95.2 million estimate, proportionately reduced based on the post-August 1988 scope of work changes. (May 1, 2007 PM Tr. at 73-74.) Third, they suggested a similar modification of the Fuller estimate.[107] (*Id.* at 74.) Finally, plaintiffs argued that if Harbert-Jones felt it necessary to "hide" $25 million in profits, then apparently even *defendants* thought the government had paid (at least) an extra $25 million due to the bid-rigging. (*Id.* at 75.)

In the end, the jury awarded plaintiffs $29,920,000 in damages on Contract 20A. (Verdict Form [858] at 9.) By extension, it must have determined that the government would have paid $77,080,000 on Contract 20A to a winning bidder under competitive conditions.[108] The Court will not speculate as to how

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[107] Notably, the jury could also have adjusted the Nagel or Fuller estimates—or any of the various engineers' estimates—based on evidence of typical profit margins.

[108] To be clear, this "winning bidder" would almost certainly have been Harbert-Jones. Fuller's inability to secure bonding would render any bid it offered unacceptable, and Fru-Con had pre-determined it would bid high to avoid securing the contract. Given these facts, the jury's task was, in effect, to calculate what Harbert-Jones would have bid had it believed itself to be truly competing with Fuller and Fru-Con. Defendants argue that "the very lowest the Harbert-Jones 20A bid amount would have been" was $124,990,369, a figure that appears in the joint venture's cover letter to CWO, dated July 18, 1988. (Motion Two at 15-16.) This presumption ignores, however, that by the letter's date, Schmidt had already narrowed the competitive field by securing Fru-Con's cooperation, and it assumes the letter did not anticipate Fuller would agree to refrain from bidding. Hence, the jury could reasonably have refused to accept this figure as representative of what Harbert-Jones would have bid under competitive conditions.

the jury arrived at this exact figure. Plaintiffs' counsel's list of "methods" was far from exhaustive, and the jury was entitled to compute "a just and reasonable estimate of the damage," *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), in any logical manner, based on any relevant data in the record. The Court "need not—and indeed cannot—reconstruct the precise mathematical formula that the jury adopted." *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1239 (D.C. Cir. 1984). It suffices that plaintiffs introduced several pieces of relevant evidence from which the jury could estimate what the government would have paid but for the bid-rigging. Its award falls within the broad range described by these data.

In sum, the Court concludes plaintiffs presented sufficient evidence of each defendant's liability, and of the government's damages, on Contract 20A. The jury's verdict on Contract 20A was perfectly reasonable, and the Court will not disturb it. *McGill v. Munoz*, 203 F.3d 843, 845 (D.C. Cir. 2000).

2. Contract 29

a. Liability

In spring 1989, Schmidt hosted another meeting at Holzmann's offices, and this time, he invited Giovanni Greselin of ABB SUSA and "a gentleman from Harbert." (Mar. 23, 2007 PM Tr. at 120-21.) SUSA "was running out of work," and Harbert-Jones would be its sole competitor in the bidding for Contract 29. (*Id.*) As the signed, "handwritten minutes" Greselin later provided to his superior, Luigi Ruggieri,[109]

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[109] Anderson renews his objection to the admission of Ruggieri's testimony "on the grounds previously stated to the Court." (Motion One at 5 n.3.) Yet he neither identifies those

reflect, "Greselin on the one side and Schmidt and the guy from Harbert on the other [] decided . . . that one of the two [companies] would win and the other one would cover with the higher price." (*Id.* at 121.) "[T]he loser would be compensated in kind"—that is, the Contract 29 winner would bid high on another contract to allow the loser a turn—"or in cash"—to the tune of $4 million. (*Id.* at 121-22.)

Despite having fleshed out these details, the meeting participants could not cement their agreement until Greselin had obtained Ruggieri's approval. (*Id.* at 124.) Greselin subsequently made his pitch to Ruggieri, who ratified the deal and determined SUSA would "win" the contract and would pay Harbert-Jones in cash. (*Id.* at 124-25.) Ruggieri directed Greselin to

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grounds nor directs the Court to any portion of the record or previously-filed document in which they were stated. (*See id.*) Fortunately for Anderson, HII joins in renewing his objection and specifies its basis. (Motion Two at 18 n.11.) Pre-trial, defendants sought to exclude Ruggieri's testimony "unless and until [plaintiffs] prove[] by a preponderance of the evidence that there was a conspiracy by these defendants to rig Contract 29." (Mem. Op. of Mar. 20, 2007 [734] at 1.) The Court admitted the testimony under Federal Rule of Evidence 104, and because this testimony qualified as non-hearsay under Rule 801(d)(2)(E), the Court now reaffirms its decision. The latter rule provides that an out-of-court statement is admissible for its truth if the proponent shows by a preponderance of the evidence that: (1) a conspiracy existed; (2) the declarant and defendant were members of this conspiracy; and (3) that the statement was made during the course and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). As explained herein, the record contains evidence from which a jury could reasonably find that SUSA and HII, through their agents, Greselin, Ruggieri, and Anderson, agreed to rig bids on Contract 29, and that Greselin's statements to Ruggieri were made to finalize this agreement. Thus, Ruggieri's testimony was admissible as non-hearsay against both Anderson and HII.

"interface as needed with [] Schmidt and [the Harbert man] to that effect." (*Id.* at 125.) After Greselin left, Ruggieri shredded his copy of the "minutes" because he believed it to be "an illegal document . . . probably against a number of laws." (*Id.* at 126.)

Meanwhile, Robert Hemler, Greselin's subordinate, began preparing SUSA's bid on Contract 29. (Mar. 23, 2007 AM Tr. at 74-75.) Although Hemler's team produced an internal cost estimate of $85 million, an independent engineer sent in by Greselin predicted costs of $155 million. (*Id.* at 75-76.) Hemler managed to convince Greselin that the engineer's estimate was too high, but it was like "pulling [] teeth." (*Id.* at 78-79.) In July 1989, after Hemler extracted a last-minute, $5 million reduction from Greselin, SUSA submitted an initial bid of $131,978,000 on Contract 29. (*Id.* at 84; Mar. 23, 2007 PM Tr. at 67-68.) Hemler characterized this bid as lying at the "high end" of the "competitive range," the low end being "about $120 million." (Mar. 23, 2007 AM Tr. at 86.) Prior to the bid opening, Hemler, fearing stiff competition from Harbert-Jones, pleaded with Greselin to further lower SUSA's bid, but Greselin refused. (Mar. 23, 2007 PM Tr. at 14.) Harbert-Jones, meanwhile, entered a bid of $147,424,305. (*Id.* at 9.) Naturally, CWO selected ABB SUSA's lower bid. (*See id.* at 37.) But $132 million exceeded the sum USAID had allocated for Contract 29, and rather than impose the excess cost on the Egyptian government, CWO negotiated with SUSA over certain line items to reduce the contract value to $114,869,355.[110] (*Id.* at 88, 90.)

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[110] Change orders and additions boosted the amount eventually paid to $134-$135 million. (Mar. 23, 2007 PM Tr. at 92.)

In 1990, once these negotiations had ended, Ruggieri met with Schmidt to finalize SUSA's payoff to Harbert-Jones. (Mar. 26, 2007 AM Tr. at 17.) Because the contract had been awarded below the original bid price, he insisted on reducing the payoff amount from $4 million down to $3.4 million. (*Id.* at 17, 21.) To conceal the nature of the transaction and to shield the two parent companies, they agreed that invoicing and payment would occur between a Swiss Holzmann subsidiary and a British SUSA subsidiary. (*Id.* at 17-19.) The payoff process proceeded as agreed. (*Id.* at 22-26; Pl.'s Exs. 21, 22, 637.)

i. Anderson

Before discussing the evidence of Anderson's participation, the Court must address a threshold argument that he and other defendants raise: they contend plaintiffs offered no evidence that the parties ever reached an agreement. (Motion One at 5-7; Motion Four at 21-22.) As noted above, Greselin could not definitively obligate SUSA without Ruggieri's approval. (Mar. 23, 2007 PM Tr. at 124.) Though Ruggieri ratified the terms presented in the "minutes" document and instructed Greselin to "interface" with Schmidt and the "guy from Harbert" to effectuate them, he had no personal knowledge of how, or if, Greselin performed this task. (*Id.* at 125; Mar. 26, 2007 AM Tr. at 45.) Greselin, himself, testified that he did not meet with Schmidt again before the bidding and did not specifically recall talking with him on the telephone; but he never flatly denied having communicated with anyone associated with

Harbert-Jones after obtaining Ruggieri's approval.[111] (Apr. 25, 2007 PM Tr. at 81.)

Defendants forget that jurors may make reasonable inferences from the evidence and may employ their common sense. (See May 4, 2007 AM Tr. at 29.) Greselin, Schmidt, and the "guy from Harbert" reached an "agreement in principle" to rig the bidding on Contract 29.[112] (Apr. 25, 2007 PM Tr. at 78.) Ruggieri ratified their agreement, selected from the alternative bid-rigging and payoff methods Schmidt had offered, and directed Greselin to carry out the plan. (Mar. 23, 2007 PM Tr. at 124-25.) The bidding and payoffs then proceeded as *Ruggieri had specified.*[113]

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[111] Greselin did not appear at defendants' civil trial but did testify at Anderson's criminal trial. Defendants introduced portions of his testimony into evidence during their case. (*See* Apr. 25, 2007 PM Tr. at 60-81.)

[112] Anderson's contention that Greselin "was [not] even capable of accepting" Schmidt's "double-alternative" proposal is specious. (Motion One at 5.) The presence of alternatives does not defeat an agreement. Using counsel's example, even when two friends "can't decide what restaurant to go to" without "further discussion," they may nonetheless have agreed they will dine together. (May 2, 2007 AM Tr. at 71.)

[113] Anderson asserts that had an agreement been reached, Ruggieri and Schmidt would not have negotiated the payoff amount—it would already have been decided. (Motion One at 6.) In particular, he contends that "[i]f Greselin had followed Ruggieri's orders and met with Schmidt to communicate and reach agreement that [SUSA] wanted only to pay money for protection on Contract 29, there would have been no reason for Schmidt to press [Ruggieri] for 'in kind' compensation." (Motion One at 4.)

This argument is flawed for at least two reasons. First, since the parties' original discussion, circumstances had changed markedly: given CWO's reductions in Contract 29's scope and overall value, it was perfectly reasonable to revisit the payoff amount. Second, Ruggieri never testified that Schmidt "pressed"

The jury could reasonably have attributed this to more than mere happenstance. Ruggieri believed that SUSA had made a deal with Harbert-Jones, observed events consistent with this deal, and consequently paid $3.4 million to Harbert-Jones. (*Id.* at 73.) In defendants' version, Harbert-Jones' bid simply happened to exceed SUSA's, and Schmidt "snookered" Ruggieri into paying $3.4 million for nothing. (See Mar. 26, 2007 AM Tr. at 71-72; May 2, 2007 AM Tr. at 85-86). The jury could reasonably have deemed Ruggieri's interpretation of events more plausible.[114]

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him for in-kind compensation; instead, he stated he had a "feeling" that Schmidt "preferred" compensation in kind to a cash payoff. (Mar. 26, 2007 AM Tr. at 68-69.)

[114] In his reply, Anderson offers a thorough treatise on what constitutes a "reasonable inference." (Reply One at 1-3 & n.2.) As is likely self-evident, in this Opinion, where the Court discusses inferences the jury could have made, it has determined these inferences are ones that "'reasonable and fair-minded men [and women] in the exercise of impartial judgment' might draw from the evidence." *Georgetown Hotel v. NLRB*, 835 F.2d 1467, 1475 (D.C. Cir. 1987) (quoting *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1326 (11th Cir. 1982)). Anderson's true quibble appears to be that plaintiffs presented no direct evidence on certain points—the communication cementing the agreement, and his connection to it. (Reply One at 3.) He disregards, however, that

> [c]ircumstantial evidence can be of high probative quality. For example if one goes to bed and there is no snow on the ground, and one wakes up to find snow on the ground, the snow is powerful evidence—albeit wholly circumstantial—that it snowed while one was asleep.

Kimberlin v. Quinlan, 6 F.3d 789, 808 (D.C. Cir. 1993) (Edwards, J., dissenting), *vacated on other grounds* by 515 U.S. 321 (1995). Plaintiffs presented evidence that Ruggieri provided the necessary approval for the original "agreement in principle," that he ordered Greselin to carry out the agreement, and that the bidding and payoffs transpired as agreed. Just as one may

Even if the parties had such an agreement, however, Anderson claims plaintiffs presented no evidence of his connection to it.[115] (Motion One at 7-12.) When

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reasonably infer on awaking to a blanketed ground "that it snowed while one was asleep," so, here, the jury could have reasonably inferred that the bidding and payoffs occurred pursuant to a finalized agreement.

[115] Attacking the evidence linking him to the conspiracy, Anderson observes that precedents in "this District and this Circuit are legion that a jury verdict may not rest upon improper inferences or the fact finder's speculation about the evidence," and to prove his point, he cites and quotes from many of them. (Motion One at 9-12.) He implicitly concedes that whether an inference is reasonable or speculative depends heavily on a case's unique facts, and he thus attempts to analogize only one of his numerous examples. (*Id.* at 11 (discussing *Wilson v. Good Humor Corp.*, 757 F.2d 1293 (D.C. Cir. 1985)). *See also* Motion Two at 19-20 (examining same case).)

In *Wilson*, the trial court granted defendant David Williams' motion for a directed verdict because no reasonable jury could find that *he* was the ice cream truck driver whose negligence caused plaintiffs' child's death. 757 F.2d at 1298-99. Plaintiffs presented only one identification witness, who testified he spoke with the driver at the accident scene and wrote down the man's name. *Id.* at 1298. Yet the witness never visually identified Williams, never offered a physical description of the driver, and never produced the paper on which he had transcribed the driver's name. *Id.* He believed "vaguely" that the driver's name had been *Davis* Williams. *Id.* On appeal, the Court of Appeals agreed that such a "bare and uncertain identification of the [defendant's] name" would not, alone, "permit a reasonable juror to conclude that the vendor at issue was in fact the defendant Williams." *Id.*

Anderson contends the same result should obtain here, where *no witness* identified Anderson as having attended the Schmidt-Greselin meeting or described the "guy from Harbert" who did. (Motion One at 11.) In *Wilson*, however, *no other evidence* linked Williams to the accident. Here, as explained below, plaintiffs presented several other pieces of circumstantial evidence

Greselin first met with Schmidt, someone associated with "Harbert-Jones" joined them. (Apr. 25, 2007 PM Tr. at 69. *See also* Mar. 23, 2007 PM Tr. at 120-21.) Though no witness particularly identified this individual as Anderson, plaintiffs presented other evidence from which the jury could reasonably have concluded it was he. First, Anderson had the authority to approve the joint venture's involvement in bid-rigging: he was managing partner of the joint venture and held powers of attorney to act for HII, its majority partner, and for the joint venture, itself, in bidding on Contract 29. (Pl.'s Ex. 653C.) Second, Anderson was intimately involved in collusion—spearheaded by Schmidt—on Contracts 20A and 07: he represented HII in at least two meetings among the competitors to rig bids on these contracts. (Mar. 21, 2007 AM Tr. at 42-50; Mar. 21, 2007 PM Tr. at 87-88; Mar. 22, 2007 PM Tr. at 62-69.) Third, Anderson spent three days in Frankfurt, site of Holzmann's headquarters, around the time when the Schmidt-Greselin meeting occurred.[116] (Pl.'s Ex. 596(a); Apr. 4, 2007 PM Tr. at

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connecting Anderson to the Schmidt-Greselin meeting. The syllogism proposed in Anderson's reply brief fails precisely because it ignores these critical facts. It characterizes Anderson only as "a Harbert man" rather than as Harbert's point man for bidding on Egyptian construction contracts, who had represented HII at meetings hosted by Schmidt to rig bids on other such contracts, and whose travel records reflect his presence at the meeting location around the time it occurred.

[116] Anderson minutely dissects Ruggieri and Greselin's testimony to demonstrate that his Frankfurt travel could not have coincided with the Schmidt-Greselin meeting. (Reply One at 12-13.) But given the lapse of *eighteen years*, the jury could reasonably have inferred that Ruggieri and Greselin's statements about when certain events occurred might be somewhat imprecise. While Anderson's travel record, alone, does not prove he attended the Schmidt-Greselin meeting, the jury might

74-76.) Fourth, during that meeting, the unidentified Harbert-Jones man did not object to the negotiated terms but did balk at signing the written "minutes" document. (Apr. 25, 2007 PM Tr. at 77.) Coincidentally, some months before, when Anderson represented HII at a meeting on Contract 20A bid-rigging payoffs, Anderson first signed a written agreement documenting the conspiracy's terms but then scratched out his name to disguise his involvement. (Mar. 21, 2007 AM Tr. at 48-49.) From this circumstantial evidence, the jury could reasonably have inferred that Anderson was the "gentleman from Harbert" who attended the Schmidt-Greselin meeting.

Next, Anderson challenges plaintiffs' exhibit 648, the sole documentary evidence of the claim on which he was found liable. He contends the document should have been excluded as incomplete, or alternatively, that its incompleteness so diminished its weight that no reasonable jury could have concluded it proved a false claim was submitted or presented to the government. (Motion One at 13-16.) Federal Rule of Evidence 106, which partially codifies the common-law rule of completeness, provides that an adverse party may require the introduction of omitted portions of an incomplete document "which ought in fairness to be considered contemporaneously with it." Fed. R. Evid. 106; *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988). As the Supreme Court explained in *Rainey*, the rule assures that "when one party has made use of a portion of a document, *such that misunderstanding or distortion can be averted only through presentation of another portion*, the

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reasonably have attached some significance to his presence in Frankfurt within mere days of the time frames mentioned by the witnesses.

material required for completeness is ipso facto relevant." 488 U.S. at 172 (emphasis added).[117]

Though at least four pages of exhibit 648 appeared to be missing, the exhibit nonetheless had substantial probative value, and its incompleteness did not give rise to unfair prejudice. Its relevance was twofold: it reflected that claim 56 was submitted to, and paid by, the government, and it stated the value of that claim. (*See* Pl.'s Ex. 648.) The omitted pages, which the government did not have, and which provided only "backup" information on the costs billed in the interim statement, could neither have aided nor hindered these purposes, so their absence did not detract from the exhibit's probative value.[118] (*See*

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[117] Anderson states a more categorical rule: when "a document is incomplete or deficient on its face . . . [its] admission into evidence is deemed improper." (Motion One at 13.) But the authorities on which he relies do not support this inflexible reading. *See Weir v. Crown Equip. Corp.*, 217 F.3d 453, 458-59 (7th Cir. 2000) (though trial court found many of plaintiff's proffered accident reports were "vague, incomplete, and otherwise confusing," it nonetheless admitted the most clearly relevant reports); *Cortes v. Maxus Exploration Co.*, 758 F. Supp. 1182, 1184-85 (S.D. Tex. 1991) (EEOC probable cause determination excluded under Rule 403 due to its "demonstrable lack of probative value"); *Seol v. Saipan Honeymoon Corp.*, 5 N. Mar. I. 238, 241 (1999) (trial court, in fairness, should have excluded incomplete exhibit because plaintiffs' counsel refused to produce the second page). Rather, in this Circuit, "application of the rule of completeness is a matter for the trial judge's discretion." *United States v. Washington*, 12 F.3d 1128, 1137 (D.C. Cir. 1994).

[118] Anderson suggests only that these pages could have revealed "whether the government's check was attributable to a change order, as opposed to original work," but it is unclear why he believes this distinction important. (Motion One at 15.) Once SUSA had obtained the contract through collusion, every invoice it submitted was false, *see supra* note 83, and because this

Mar. 26, 2007 AM Tr. at 113, 116.) Further, although the appearance of official government insignia on a document "will indubitably influence the jury . . . such an influence is permissible and does not rise to the level of unfair prejudice" where, as here, the document has some probative value. *Cortes v. Maxus Exploration Co.*, 758 F. Supp. 1182, 1185 (S.D. Tex. 1991). Thus, the Court did not err in admitting plaintiffs' exhibit 648.[119]

Furthermore, considering the narrow purposes for which plaintiffs relied on the exhibit, its probative value was more than sufficient to support the jury's verdict. As explained above, plaintiffs presented other evidence sufficient to prove that SUSA secured Contract 29 by virtue of a bid-rigging conspiracy to which Anderson was a party. Claims submitted to the government under any contract secured through a collusive conspiracy are, inevitably, false or fraudulent. *Hess*, 317 U.S. at 543-45. Exhibit 648 reflected that SUSA submitted a claim to the government which the government paid. Nothing in the record suggests, and Anderson does not contend, that the omitted pages would have indicated otherwise.

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invoice fell within the limitations period, Anderson could be held liable for it.

[119] Contrary to Anderson's assertion, plaintiffs did lay an evidentiary foundation for the exhibit. (*See* Mar. 26, 2007 AM Tr. at 85-87.) They offered testimony from German Gallegos, a former SUSA CFO familiar with its interim billing statements and with the checks the U.S. sent in response. (*Id.* at 75-91.) He identified exhibit 648 as an interim billing statement, number 56, on Contract 29, with an attached U.S. Treasury check in the amount billed. (*Id.* at 86-87.) He further testified that SUSA maintained such records as a regular business practice. (*Id.* at 87.) Anderson does not indicate in what respect he believes this foundation deficient.

Hence, the record contains sufficient evidence from which the jury could reasonably have found Anderson liable on claim 56 of Contract 29.

ii. HII

As with Contract 20A, the jury could reasonably have found HII liable on Contract 29 by virtue of the knowledge and acts of its agent, Roy Anderson. As discussed above, plaintiffs demonstrated that Anderson played a prominent role in the bid-rigging on Contract 29. *See supra* part III.A.2.a.i. He had authority to act for HII with respect to Contract 29,[120] and under the circumstances, the jury could reasonably have concluded that he exercised that authority.

The conclusions that Anderson was the "Harbert" man and that he acted for HII are mutually reinforcing. As Ruggieri testified, only two companies had pre-qualified to bid on Contract 29: SUSA, and the joint venture between J.A. Jones and HII. (Mar. 23, 2007 PM Tr. at 120-21.) Three individuals attended the bid-rigging meeting for that contract: Greselin, of SUSA; Schmidt, of J.A. Jones' parent company; and the "gentleman from Harbert." (*Id.*) From all the evidence, the jury could reasonably have inferred that the "gentleman from Harbert" represented the other joint venture partner, HII, and that he was the same gentleman who represented HII at the Contract

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[120] In the joint venture's 1988 tender documents on Contract 20A, HII represented that it—not HIE—owned a majority stake in the joint venture, and it held out Roy Anderson as its vice-president. (Pl.'s Exs. 109, 162.) Bill Harbert, then HII's president, had sent Anderson to London some years before to work on HII's behalf. (Pl.'s Ex. 250.) He granted Anderson the authority, "without reservation," to represent HII in bidding for international construction projects, including Contract 29. (Pl.'s Exs. 116, 653C.)

20A bid-rigging meeting, Roy Anderson. Indeed, the original written agreement to collude on Contract 20A—to which Anderson hand-drafted an addendum, (Pl.'s Ex. 2)—specifically contemplated future bid-rigging on, *inter alia*, Contract 29, (Pl. Ex.'s 1).[121] Given HII's participation, through Anderson, in the Contract 20A conspiracy, the jury might have viewed this reference as additional evidence that HII was more likely than not the "Harbert" whose delegate attended the Schmidt-Greselin meeting.

Finally, regardless of whether Anderson attended the meeting or did so on HII's behalf, plaintiffs presented evidence from which the jury could reasonably have found that this meeting was part of a broad, overarching conspiracy to rig bids on construction contracts. *See infra* part III.A.4. Having willfully joined this conspiracy at its outset, *see supra* part III.A.1.a.i, HII could be held liable for its co-conspirators' actions in furtherance thereof, including their knowing creation and presentation of false claims on Contract 29. *See Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983).

b. Damages

Defendants assert plaintiffs failed to prove the government suffered any damages on Contract 29—essentially, that the bid-rigging agreement had no impact whatsoever on the price the government paid. (Motion One at 16-17; Motion Two at 23-26; Motion Four at 27-28.) They first point out that Hemler, who

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[121] HII seeks to diminish this reference's significance, (Motion Two at 21-23), but its critique once again relies on an erroneous premise—that one may join a conspiracy after the agreement's inception *only* so long as it remains wholly executory. *See supra* note 87.

prepared SUSA's Contract 29 bid, was unaware of the bid-rigging agreement with Harbert-Jones and characterized SUSA's ultimate bid as "reasonable" and "fair." (Mar. 23, 2007 PM Tr. at 61, 95, 105; Mar. 23, 2007 PM Tr. at 127, 128.) Even Greselin testified that "the price was low and not raised." (Mar. 25, 2007 PM Tr. at 79.)

Hemler also testified, however, that he had identified at least $10 million in "potential savings" in SUSA's June 27, 1989 bid calculation of $137 million—that is, he believed SUSA could profitably perform the contract for $127 million. (*See* Mar. 23, 2007 AM Tr. at 84; Pl.'s Ex. 75.) Mere days before its submission on July 2, Hemler persuaded Greselin to reduce SUSA's bid by $5 million, only half the potential amount. (Mar. 23, 2007 AM Tr. at 84-85.) After CWO received SUSA's initial bid, but before it opened the sealed bid envelopes, Hemler—fearing stiff competition from Harbert-Jones—pleaded with Greselin to further lower SUSA's bid.[122] (Mar. 23, 2007 PM Tr. at 14.) Greselin, who knew Harbert-Jones posed no threat, refused. (*Id.*) Hemler described Greselin's "uncommon" involvement in the bidding

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[122] Though defendants, in a footnote, state that USAID rules precluded SUSA from submitting a revised bid, they cite no authority for this proposition. (*See* Reply Two at 21 n.17.) Hemler, at least, believed that SUSA had "the opportunity to consider a price adjustment just before the commercial bid opening." (Pl.'s Ex. 77.)

Plaintiffs rely in part on Hemler's suspicion that Harbert-Jones had submitted a bid "around $120 million" in arguing that but for Greselin's opposition, Hemler would have reduced SUSA's bid to $120 million. (Opposition Two at 26.) The jury may well have adopted this logic. As discussed herein, however, even a more conservative reading of the evidence justifies the jury's verdict.

process as "the most singular remarkable incident of [his] 35-year career." (*Id.* at 97, 110.) The jury could reasonably have concluded that but for Greselin's "very forceful" influence, (id. at 45), Hemler would have submitted an amended bid of as little as $127 million, and hence that SUSA's initial bid was inflated by as much as $5 million.

Defendants further note that post-award negotiations with USAID reduced the contract price by $17.1 million, and they argue this process must have eliminated any inflation the bid-rigging might have caused. Yet as defendants' evidence reflects, a reduction in the "provisional sum" accounted for most of the decrease. (*See* Defs.' Ex. 334.) Hemler explained that CWO's tender documents had instructed Contract 29 competitors to add "a provisional amount of 10 percent" to their final bids, (Mar. 23, 2007 AM Tr. at 83); because it was added to the top, this sum could not have concealed any padding that might have been included in SUSA's bid. CWO reduced the provisional sum percentage to 1 percent, and this change accounted for $10.8 million of the total $17.1 million decline in the contract price. (Def. Ex. 334.) To achieve the additional $6.3 million in savings, CWO eliminated certain line items from its tender request and reduced SUSA's projected mobilization costs. (*Id.*) While these line items may have harbored *some* of the alleged inflation in SUSA's bid, reasonably, they must also have included some legitimate costs. The jury could thus have concluded that even if CWO's hard-nosed negotiating tactics eliminated some of the remaining $5 million in "potential savings," the

final contract price still incorporated some amount of inflation attributable to the bid-rigging.[123]

As with Contract 20A, due to defendants' collusion, the jury could not precisely calculate what the government would have paid under competitive conditions, and it thus endeavored to "make a just and reasonable estimate . . . based on relevant data," *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Plaintiffs presented several such relevant data to the jury. First, plaintiffs' expert, Professor McAfee, testified that according to economic theory, a cartel bidder must incorporate certain, inherent costs of collusion, including "any payments made to com-

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[123] Defendants argue that "[t]he evidence indicates that CWO would have 'forced the price down'" to no more than $114 million under any circumstances because any excess costs would have fallen to the Egyptian government. (Motion Two at 25 (quoting Mar. 23, 2007 PM Tr. at 109).) As an initial matter, this argument mischaracterizes a statement Hemler conspicuously couched as an "opinion." (Mar. 23, 2007 PM Tr. at 109.) The jury need not have accepted Hemler's opinion, and thus the Court need not do so either. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 467 F. Supp. 2d 74, 87 (D.D.C. 2006) (Hogan, C.J.) (on a Rule 50(b) motion, the court "must disregard all evidence favorable to the movant that the jury was not required to believe"). Nonetheless, even if credited, defendants' premise does not redeem their causation argument. They imply CWO had no incentive to negotiate a price below $114 million because USAID had promised to contribute that sum. Arguably, it was in CWO's interest to negotiate as much work from SUSA as it could get for that $114 million. Thus, USAID would have paid $114 million regardless of the amount of SUSA's bid. Assuming this was the case, however, absent the bid-rigging, CWO would have had to eliminate fewer line items from the bid—and thus would have received more value in return for its $114 million—to reach the magic number. However defendants wish to construe the situation, the government still suffered compensable harm due to the bid-rigging.

petitors," into his bid to avoid a net loss. (Apr. 5, 2007 PM Tr. at 99-100.) *See also United States v. Killough*, 848 F.2d 1523, 1532 (11th Cir. 1988) (though payoffs to co-conspirators set "neither a floor nor a conclusive presumption of the measure of damages" in a bid-rigging case, they are "relevant as circumstantial evidence"). The jury also heard that via their subsidiaries, SUSA remitted a $3.4 million payoff to Harbert-Jones. (Mar. 26, 2007 AM Tr. at 22-26; Pl.'s Exs. 21, 22, 637.) From this testimony, the jury could reasonably have concluded that unless the final contract price of $114 million included at least $3.4 million in padding, SUSA would have had to perform the contract at a loss. Second, as explained above, the jury could reasonably have concluded that bid-rigging inflated the bid CWO accepted on Contract 29 by up to $5 million. Thus, the jury could have determined that the government paid up to $5 million—and likely, at least $3.4 million—more than it would have absent defendants' collusion. Under these circumstances, its $3.4 million damages award was an eminently "just and reasonable estimate" adequately supported by the evidence.

3. Contract 07

a. Liability

In 1990, USAID pre-qualified both Harbert-Jones and Fru-Con to bid on a third Egyptian construction project, Contract 07. (Mar. 22, 2007 PM Tr. at 63-64.) Roughly two months before the bidding date, Schmidt telephoned Werner Hoffmeister of Bilfinger & Berger, Fru-Con's parent company, with an invitation to meet to discuss "the procedure of the bidding." (*Id.* at 64.) Hoffmeister accepted and traveled to Holzmann's Frankfurt offices, where he met with Schmidt and Anderson. (*Id.* at 64-65.) Schmidt proposed that Fru-

Con should bid high to permit Harbert-Jones to secure the contract, but Hoffmeister initially balked. (*Id.* at 65-66.) He questioned how the scheme could work unless all other pre-qualified companies participated, and even if such consensus were achieved, he felt Contract 07 should go to Fru-Con, not Harbert-Jones. (*Id.* at 66-67.) Schmidt then indicated that the other competitors either were, or soon would be, onboard, and Anderson agreed to contact Morrison-Knudsen, the only potential bidder whose consent Schmidt had not yet obtained.[124] (*Id.* at 67.)

Two weeks after their initial meeting, Schmidt called Hoffmeister to inform him that Morrison-Knudsen could not be contacted, and he proposed a new arrangement: if CWO awarded Contract 07 to either Harbert-Jones or Fru-Con, the winner would pay 1.5 million dollars or Deutschmarks to the loser. (*Id.* at 68-69.) Hoffmeister agreed. (*Id.* at 69.) Just before the bid date, he heard from Schmidt again: Schmidt had heard rumors that Fru-Con and other competitors would not bid, and he feared that if Harbert-Jones proved the sole bidder, CWO would void the tender and start afresh. (*Id.* at 69.) Though Hoffmeister tried to intervene with Fru-Con, his trusted contacts in the subsidiary were both on vacation, and Hoffmeister was unwilling to discuss the situation with anyone else. (*Id.* at 69-70.) Though

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[124] Soon afterward, Anderson traveled to Boise, Idaho, where Morrison-Knudsen had located its headquarters, and his travel record suggests he at least planned to visit Morrison-Knudsen. (Pl.'s Ex. 607; Apr. 4, 2007 PM Tr. at 73-74.) Defendants offered video deposition testimony from Morrison-Knudsen executives that indicated Anderson never proposed any sort of financial arrangement on Contract 07 to them. (*See* Apr. 25, 2007 PM Tr. at 26-27.)

Fru-Con did not enter a bid, Schmidt's fears proved groundless, and Harbert-Jones secured the contract by underbidding Morrison-Knudsen. (*Id.* at 70.) After additional discussions, Holzmann paid the $1.5 million loser's fee to Bilfinger & Berger. (*Id.*)

For several reasons, defendants contend plaintiffs failed to present sufficient evidence that any claims submitted on Contract 07 were false. (Motion Two at 27-28; Motion Four at 19- 20.) They point out that Schmidt, Anderson, and Hoffmeister never agreed on which company would win the contract, that Hoffmeister in fact instructed the Fru-Con team to prepare a competitive bid, and that the evidence showed Morrison-Knudsen had prepared a competitive, though losing, bid. These facts may establish that Contract 07 was not subject to the same sort of bid-rigging that occurred on Contracts 20A and 29, but they do not impugn the jury's verdict. Collusion may take many forms, but in whatever guise, it renders false or fraudulent all claims submitted to the government on a contract thereby obtained.[125]

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[125] Even HII appears to acknowledge, in its reply brief, that a loser's fee arrangement could give rise to FCA liability. (*See* Reply Two at 22.) BHIC, on the other hand, insists that "collusion, like bid rigging, requires that competition be eliminated." (Reply Four at 15 (citing *Hess*, 317 U.S. at 543.) This semantic argument is a non sequitur—nothing in the FCA requires a jury to find "collusion" to hold a party liable. Moreover, while the collusion in *Hess* did consist of a "conspiracy to remove all possible competition," the Supreme Court in no way suggested that its description of the jury's factual findings in that case should be read as exclusively defining collusion within the FCA. *See* 317 U.S. at 543. Here, plaintiffs' expert testified that the term "collusion" embraces any situation in which a group of firms or individuals get together to try to circumvent the competitive process and generally increase the price." (Apr. 5, 2007 PM Tr.

"[W]hen a contract is initially obtained through fraud or deception, every claim for payment submitted pursuant to that contract is thereby tainted and triggers FCA liability regardless of whether the claim is itself 'false or fraudulent.'" *United States ex rel. Bettis v. Odebrecht Contractors of Cal.*, 297 F. Supp. 2d 272, 279 (D.D.C. 2004) (Huvelle, J.). In its bid documents, Harbert-Jones certified that its bid was made "without connection with any other . . . corporation making any other tender for the same purpose." (Pl.'s Ex. 683; *see also* Pl.'s Ex. 146.) In fact, this statement was untrue: Harbert-Jones had formed a side agreement with its competitor, Fru-Con. (*See* Mar. 22, 2007 PM Tr. at 68-69.)

More concretely, as discussed below, the jury could reasonably have concluded that this side agreement prompted Harbert-Jones to submit an inflated bid. *See infra* part III.A.3.b. Consequently, the claims Harbert-Jones submitted to the government on Contract 07 incorporated this inflation, and these illegitimate charges rendered the claims false. *See United States ex rel. Marcus v.* Hess, 317 U.S. 537, 543 (1943) (where collusion among bidders inflated contract price, the initial fraud "entered into every swollen estimate which was the basic cause for payment of every dollar" paid by the government). *See also* S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 ("each and every claim submitted under a contract . . . which was originally obtained by means of false statements or other corrupt or fraudulent conduct . . . constitutes a false claim"). The jury could reasonably have held HII

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at 77.) A jury could reasonably find that this much broader definition, which defendants did not challenge, encompasses the loser's fee arrangement on Contract 07.

directly liable for the involvement of its agent, Roy Anderson, in conspiring to submit these false claims and in causing them to be made and presented to the government.[126] As discussed below, it could have

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[126] HII again disclaims responsibility for Anderson's knowledge and conduct; alternatively, it insists Anderson knew nothing of the loser's fee agreement. (Motion Two at 27; Reply Two at 22-23.) As to each contention, there was evidence from which the jury could reasonably have reached the opposite conclusion.

First, it could have imputed Anderson's knowledge and actions in willfully joining and advancing the collusive conspiracy on Contract 07 to HII. HII expressly empowered Anderson to act on its behalf in bidding on Contract 07, (*see* Pl.'s Ex. 652C), and Anderson thereafter signed and identified himself as an HII officer on documents related to Contract 07, (see Pl.'s Ex. 145; Def.'s Ex. 368). At the Frankfurt meeting on Contract 07, three individuals—Hoffmeister, Schmidt, and Anderson—discussed a collusive arrangement involving three companies—Fru-Con, J.A. Jones, and HII. (*See* Mar. 22, 2007 PM Tr. at 64-65.) At the meeting, Hoffmeister represented Fru-Con, and the jury could reasonably have inferred that Schmidt and Anderson represented, respectively, J.A. Jones and HII.

Second, Anderson's evident role as Schmidt's partner in the Contract 07 scheme indicates he would have known about the loser's fee agreement. At the Frankfurt meeting, Schmidt delegated the task of contacting the last remaining competitor, Morrison-Knudsen, to Anderson. (*Id.* at 67.) Anderson accepted this duty, and plaintiffs offered some evidence that he pursued it, albeit unsuccessfully. (*See* Pl. Ex. 607; Apr. 4, 2007 PM Tr. at 73-74; Apr. 25, 2007 PM Tr. at 26-27.) Additionally, in November 1990, Anderson spoke with John Ollis of Jones, who was then working on the Harbert-Jones Contract 07 bid. (Mar. 27, 2007 PM Tr. at 40-42.) When Ollis brought up that Jones' estimating team had not yet arranged a reconciliation meeting with their Harbert counterparts, Anderson told him that "this thing had been set up," and that all the pre-qualified contractors "were part of the setup." (*Id.* at 41-42.) Though inaccurate—no party disputes that Morrison-Knudsen was not "part of the setup"—Anderson's statement does indicate he knew an agree-

imputed this liability to other participants in the overarching conspiracy, including HC and BHIC.[127] *See infra* part III.A.4.

b. Damages

As with its liability finding, evidence presented at trial supported the jury's $1,026,029.22[128] damages

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ment had been reached on Contract 07—more than he would have known had his involvement ended after the Frankfurt meeting.

From this evidence, the jury could reasonably have concluded that Anderson knew of the loser's fee arrangement and imputed his knowledge to HII. Reasoning that but for the collusive conspiracy, which HII had, through Anderson, willfully joined, claims submitted on Contract 07 would not have been false, the jury could have held HII liable for causing these false claims to be made and presented to the government.

[127] The jury might also have recalled that Anderson claimed to be "President and CEO" of BHIC's "international operations," (Pl.'s Exs. 389, 568A), and held a power of attorney for BHIC from May 12, 1992 onward, (*see* Mar. 30, 2007 AM Tr. at 61-62; Pl.'s Ex. 386). It might reasonably have inferred that after this date, Anderson acted for BHIC as well as for HII and/or HIE. Armed with Anderson's knowledge, BHIC provided support services essential to the joint venture's performance of Contract 07. (See Pl.'s Exs. 383, 615B-E, 682; Apr. 4, 2007 PM Tr. at 97-111.) From these facts, the jury could reasonably have concluded that BHIC willfully joined and advanced the conspiracy, and knowingly caused false claims to be created and presented to the government on Contract 07. *See United States ex rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235, 244 (3d Cir. 2004).

[128] According to defendants, the jury must have extracted this value from a Contract 20A payoff invoice, which would amount to clear error. (Motion Two at 28-29 (citing Pl.'s Exs. 617, 618); Motion Seven at 2-4.) Throughout their filings, defendants repeatedly accuse plaintiffs and the jury of speculation, but the proverbial shoe now seems to be on the other foot. While HII has identified a striking coincidence, it again conflates correlation with causation. In reviewing a damages award, a court may not

award on Contract 07. First, Hoffmeister testified that Harbert-Jones, via Holzmann, paid a loser's fee of 1.5 million dollars or Deutschmarks to Bilfinger & Berger.[129] (Mar. 22, 2007 PM Tr. at 68-69.) According to plaintiffs' expert, Professor McAfee, economic theory prescribes that a bidder must incorporate such "payments made to competitors" into his bid to avoid a net loss. (Apr. 5, 2007 PM Tr. at 99-100.) Hence, Harbert-Jones had a strong incentive to account for the anticipated payoff in its bid rather than risk surrendering a significant chunk of its profits should it secure the contract.

Second, John Ollis' testimony concerning his November 1990 conversation with Anderson suggests Harbert-Jones acted on this incentive. When Ollis expressed concern that the Jones and Harbert teams had not yet reconciled their estimates for Contract 07, despite the rapidly approaching bid submission deadline, Anderson told him that "he and Alf Hill

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hypothesize as to the precise formula the jury adopted. *Carter*, 727 F.2d at1239. Its duty is simply to confirm that the award falls "within a reasonable range" and is supported by the evidence. *Id.* As explained herein, the jury's Contract 07 damages award satisfies both criteria.

[129] HII asserts that because the Court admitted Rainer Hermann's prior testimony against Anderson, alone, and Hoffmeister learned of the payment from Hermann, the record contains no evidence admissible against HII that the fee was actually paid. (Motion Two at 30.) This Court limited Hermann's former testimony's admissibility because only Anderson had had an opportunity to cross-examine him. (*See* Mem. Op. of Mar. 16, 2007 [722] at 7.) But this limitation extended only to Hermann's prior testimony at Anderson's criminal trial—not to out-of-court statements he had previously made to co-conspirators. (*See id.* at 4-7.) The jury was free to consider these hearsay statements, admitted through Hoffmeister, against *all* defendants.

needed room to maneuver." (Mar. 27, 2007 PM Tr. at 41.) This, he implied, had caused the delay in scheduling a reconciliation meeting. (*Id.*) He then told Ollis that something had been "set up." (*Id.* at 42.) Understanding Anderson to be referring to the bidding on Contract 07, Ollis protested that Harbert-Jones should submit a competitive bid because other big contractors might not be in on the "setup." (*Id.*) Anderson's response speaks volumes. He did not correct Ollis by explaining the "setup" had nothing to do with the bidding process; nor did he clarify that Harbert-Jones would, naturally, submit a competitive bid. (*See id.*) Instead, he assured Ollis that "all the prequalified contractors were part of the setup," implicitly confirming Ollis' interpretation of his original words. (*Id.*) Based on this testimony, the jury could reasonably have concluded that Anderson needed "room to maneuver" because he wanted to ensure Harbert-Jones submitted an inflated bid without undue interference from the Jones estimating team.[130]

Third, though Morrison-Knudsen, Harbert-Jones' sole competitor on Contract 07, originally bid high, it later adjusted its bid down $5 million-$3 million below Harbert-Jones' bid. (Apr. 19, 2007 PM Tr. at 47-49.) While Morrison-Knudsen's inexperience and ultimate disqualification do detract from the weight

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[130] Alf Hill testified that he personally prepared the Harbert-Jones Contract 07 bid without influence from Anderson and that to his knowledge, the bidding was competitive. (*See* Apr. 11, 2007 PM Tr. at 23, 25, 30, 106.) Yet Anderson's comments to Ollis—"he and Alf Hill needed room to maneuver"—implicate Hill in the conspiracy, (*see* Mar. 27, 2007 PM Tr. at 41), so the jury need not have credited Hill's assertions of non-involvement, *In re Lorazepam & Clorazepate Antitrust Litig.*, 467 F. Supp. 2d 74, 87 (D.D.C. 2006) (Hogan, C.J.).

of this evidence, it does suggest that Contract 07 could have been profitably performed for less than Harbert-Jones chose to bid.

From this evidence, the jury could reasonably have concluded that Anderson caused the Harbert-Jones bid to be inflated by as much as 1.5 million dollars or Deutschmarks. Thanks to defendants' collusion, the jury could not precisely calculate the difference between what the government actually paid and what it would have paid absent the loser's fee arrangement, so the jury was left to "make a just and reasonable estimate . . . based on relevant data," *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Under the circumstances, its award of $1,026,029.22 was entirely reasonable and within the range supported by the evidence.

4. Overarching Conspiracy

In their pleadings and at trial, plaintiffs alleged that defendants colluded on Contracts 20A, 29, and 07 in furtherance of a single, overarching conspiracy. (*See* May 4, 2007 AM Tr. at 58; Gov't's Third Am. Compl. [419] ¶3; Relator's Fifth Am. Compl. ¶¶ 1-2.) In deciding this issue, the jury looked to "whether the defendants shared a common goal, whether there was any interdependence between the alleged participants in the conspiracy, and whether there was any overlap among the alleged participants, including the presence of core participants linked to all the contracts." (May 4, 2007 AM Tr. at 58 (quoting *United States v. Gatling*, 96 F.3d 1511, 1520 (D.C. Cir. 1996)).)

Plaintiffs' evidence reflected: (1) a common goal uniting the schemes on Contracts 20A, 29, and 07 – namely, reducing competitive pressures in bidding on

USAID-funded infrastructure projects in Egypt;[131] (2) interdependence among the alleged participants;[132] (3) significant overlap among the participants;[133] and (4) ubiquitous characters whose involvement extended to all three contracts.[134] They also demon-

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[131] As the Court of Appeals instructed in *Gatling*, "a conspiracy's purpose should not be defined in too narrow or specific terms." 96 F.3d at 1520. *See also United States v. Tarantino*, 846 F.2d 1384, 1393 (D.C. Cir. 1988) (citing "the possession and distribution of narcotics for profit" as a shared goal sufficiently particularized to support a single conspiracy). Here, the shared goal of boosting profit by limiting competition on a particularized set of government-funded contracts is more than sufficiently narrow to support a single, overarching conspiracy.

[132] The written bid-rigging agreement on Contract 20A contemplates future collusion on Contract 29, (*see* Pl.'s Ex. 1; Mar. 21, 2007 AM Tr. at 29-30); Schmidt proposed a *quid pro quo* on Contract 29 to SUSA, (Mar. 23, 2007 PM Tr. at 120-21); and Anderson blithely referred to the companies pre-qualified by USAID to bid on Egyptian infrastructure projects as "the Frankfurt Club," (Mar. 27, 2007 PM Tr. at 44).

[133] For example, both Harbert-Jones and Fru-Con participated in collusion on Contracts 20A and 07, with Fru-Con receiving payoffs for its cooperation in both instances. (*See* Mar. 22, 2007 AM Tr. at 80-94; Mar. 22, 2007 PM Tr. at 63-70; Pl.'s Exs. 17, 18.)

[134] Schmidt, and to a slightly lesser extent, Anderson, emerged as ringleaders in coordinating collusion among bidders on each contract. (*See, e.g.*, Mar. 22, 2007 AM Tr. at 80- 94 (describing Schmidt's role in bid-rigging on Contract 20A); Mar. 21, 2007 AM Tr. at 40-45 (describing Anderson's attendance and conduct at meeting to finalize payoffs to Fuller on Contract 20A); Mar. 23, 2007 PM Tr. at 120-22 (describing meeting at which Schmidt proposed bid-rigging on Contract 29); *supra* part III.A.2.a.i (discussing evidence from which jury could reasonably have concluded Anderson attended Schmidt-Greselin meeting); Mar. 22, 2007 PM Tr. at 63-70 (describing Schmidt-initiated loser's fee arrangement on Contract 07 and Anderson's role in securing agreement of all competitors); *supra* note 126

strated that defendants repeatedly made collusion-related payoffs through false invoices and routed them through affiliated companies, often via a single Holzmann bank account.[135]

Based on this evidence, the jury could reasonably have concluded that defendants acted pursuant to a single, overarching conspiracy.[136] "[O]nce [a] conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable . . . so long as the purpose . . . was to advance the overall object of the conspiracy." *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983). Therefore, having willfully joined the conspiracy as to Contract 20A, HC and BHIC could each be found liable for their coconspirators' creation and presentation of false claims to the government on Contracts 29 and 07.

Accordingly, to the extent defendants' motions for judgment notwithstanding the jury's verdict challenge the sufficiency of the evidence, they shall be DENIED.

B. Statute of Limitations

HII renews its assertion that the six-year limitations period set by 31 U.S.C. § 3731(b)(1) bars

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(discussing evidence from which jury could reasonably have concluded Anderson knew of the loser's fee arrangement).)

[135] (*See, e.g.*, Mar. 22, 2007 AM Tr. at 91-95; Pl.'s Exs. 17-18; Mar. 21, 2007 AM Tr. at 76-80; Mar. 25, 2007 AM Tr. at 18-30; Pl.'s Exs. 21, 22, 365, 372-79, 635, 637.)

[136] In Anderson's criminal case, the Eleventh Circuit Court of Appeals sustained the jury's guilty verdict as to Sherman Act conspiracy based on a similar body of evidence. *See United States v. Anderson*, 326 F.3d 1319, 1327-28 (11th Cir. 2003).

plaintiffs' substantive Contract 07 claims, all but the last three of their substantive Contract 29 claims, and their FCA conspiracy claim.[137] (Motion Two at

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[137] In a final, "kitchen sink" footnote, HII also requests reconsideration of the Court's ruling that the government's Contract 20A claims relate back to the filing date of relator's sealed complaint pursuant to Federal Rule of Civil Procedure 15(c)(2). (Motion Two at 33 n.23.) HII again directs the Court's attention to *United States v. Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006), where the Second Circuit Court of Appeals held that under this Rule, claims in a government complaint in intervention do not relate back to the date a *qui tam* complaint was filed *under seal*. See 469 F.3d at 270. As this Court previously concluded, however, *Baylor's* reasoning and holding do not bind this Court, and decisions in this Circuit have uniformly held that relation back under Rule 15(c)(2) does apply to FCA claims. *See United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 14 (D.D.C. 2003) (Lamberth, J.); *United States ex rel. Purcell v. MWI Corp.*, 254 F. Supp. 2d 69, 75-76 (D.D.C. 2003) (Urbina, J.). Hence, the Court reaffirms its prior holding. (See Mem. Op. & Order of Mar. 14, 2007 [711] at 4.)

Moreover, notwithstanding *Baylor*, Rule 15(c)(1) authorizes relation back where the law that provides the statute of limitations applicable to the action permits. Fed. R. Civ. P. 15(c)(1). "[I]f that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim." Fed. R. Civ. P. 15 Advisory Committee's Note. Certain characteristics of the FCA demonstrate it is one such law. Specifically, the FCA requires relators to file their complaints under seal and to then stand idly by while the government investigates the alleged fraud. 31 U.S.C. §3730(b) (2008). By its terms, at least, the statute places no limitation on the duration of the government's investigation: though initially limited to sixty days, a district court can extend the investigation period for good cause shown. *Id.* The government may intervene at any time before this investigation period ends. *Id.* Moreover, nothing in the FCA otherwise limits the government's ability to seek redress for related, fraudulent conduct it uncovers during its investigation, whether or not it satisfies Rule 15(c)(2). As seen in this very case, this leniency poses practical problems, but one

31-33.) This argument fares no better than it did pretrial.

This Court previously held that plaintiffs' Contract 29 and 07 claims relate back to the filing date of relator's original complaint because they form part of the overarching conspiracy alleged in that complaint. (Mem. Op. & Order of Mar. 6, 2007 [613] at 9-12 (sustaining relator's objection to magistrate judge's recommendation that only Contract 20A claims could relate back). See also Mem. Op. & Order of Mar. 14, 2007 [711] (rejecting statute of limitations arguments raised in memorandum filed by HII and HC).) In asking the Court to revisit this ruling, HII rehashes the same set of arguments this Court has already rejected. (*See* Motion Two at 31.) It simply asks the Court to reconsider, "taking account of the trial evidence." (*Id.*) As explained above, plaintiffs offered evidence sufficient to sustain the conclusion that defendants' collusion on Contracts 20A, 29, and 07 comprised a single, overarching conspiracy. *See supra* part III.A.4. Thus, the trial evidence entirely supports the Court's earlier rulings.[138]

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cannot deny that the FCA purposefully affords the government great latitude to conduct a thorough—and if necessary, lengthy—investigation before filing its complaint. Based on this rationale, at least one other district court has held that government complaints in intervention relate back to the filing date of the relator's original, sealed complaint under Rule 15(c)(1). *See United States ex rel. Yen -A-Care of the Fla. Keys, Inc. v. Dey, Inc.*, 498 F. Supp. 2d 389, 397-99 (D. Mass. 2007). Indeed, *Baylor*, itself, concedes "[t]here is a colorable argument that the FCA implicitly 'permit[s]' a form of relation back." 469 F.3d at 270. Hence, even if the government's claims did not relate back under Rule 15(c)(2), Rule 15(c)(1) would nonetheless save them.

[138] Because HII does not identify particular exhibits or testimony which it believes would prompt the Court to question

The Court also held that the FCA's six-year limitations period does not bar plaintiffs' FCA conspiracy claims because *some* overt acts in furtherance of the conspiracy occurred within that time frame. (Mem. Op. & Order of Mar. 14, 2007 [711] at 4-6.) It did not, however, directly address one of the issues HII raised in its pre-trial filing and which it now asks the Court to reconsider: whether, even if plaintiffs' claims were not barred, they could use evidence of overt acts that occurred before June 30, 1989 to prove those claims. (*See* Motion Two at 33; Mem. Supp. HII and HC's Mot. in Limine to Exclude Evidence [557] at 3-7.) At trial, this Court permitted plaintiffs to introduce evidence of meetings and communications that took place before June 30, 1989; HII contends this was clear error. (Motion Two at 33.)

In its pre-trial statute of limitations rulings, this Court relied on Judge's Friedman's decision in *United States ex rel. Fisher v. Network Software Associates*, 180 F. Supp. 2d 192 (D.D.C. 2002). Particular language in that opinion bears on the present question:

> [T]he prevailing law in this circuit [holds] that "the statute of limitations in a civil damages action for conspiracy runs separately from each overt act that is alleged to cause damage . . . ."

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its previous conclusion, (*see* Motion Two at 31), the Court's reconsideration begins and ends with this determination.

> It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones . . . Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.

Schneider v. Kissinger, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005).

> *Lawrence v. Acree, 215 U.S. App. D. C. 16, 665 F.2d 1319, 1324 & n. 7 (D. C. Cir. 1981); see Thomas v. World Communications, 681 F. Supp. 55, 73 (D.D. C. 1988); see also Scherer v. Balkema, 840 F. 2d 437, 439-40 (7th Cir. 1988).* Under this rule, relator may attempt to prove the underlying conspiratorial agreement through those overt acts that occurred after November 22, 1993, but not those acts that occurred before that date; if successful, he may recover damages for all violations committed as a part of the conspiracy from that date forward. Thus, the statute of limitations bars recovery for some but not all of the acts committed as a part of the conspiracy alleged in Count 3.

180 F. Supp. 2d at 195. Based on this language, this Court stated that relator could "not use overt acts occurring prior to the date the statute of limitations began to run" to prove the underlying conspiratorial agreement. (Mem. Op. & Order [613] at 6.)

A nuanced reading of these opinions confirms the Court did not err in admitting plaintiffs' evidence of pre-June 30, 1989 acts and events. Though the *Fisher* opinion does not delve deeply into the underlying facts, it appears to involve a situation where the plaintiff endeavored to prove an agreement existed through circumstantial evidence—that is, subsequent conduct consistent with an earlier, pre-limitations deadline agreement. *See* 180 F. Supp. 2d at 193-95. Here, however, plaintiffs had unearthed *direct* evidence of the underlying conspiratorial agreement—testimony by conspirators concerning meetings at which they formulated the agreement and documents in which they memorialized its terms—and had no need to employ circumstantial evidence to establish

its existence. (*See, e.g.*, Mar. 22, 2007 AM Tr. at 80-94; Mar. 23, 2007 PM Tr. at 120-24; Pl.'s Ex. 1, 2.)

Separately, they introduced evidence of pre-June 30, 1989 acts in furtherance of this agreement—for example, the co-conspirators' submission of inflated bids on Contract 20A—to prove causation and damages.[139] *Fisher* does not intimate that evidence of

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[139] Notably, defendants' pre-trial motion sought to exclude evidence of "meetings, conversations, or other alleged 'conspiratorial' conduct that occurred prior to June 30, 1989, offered for the purpose of proving an underlying conspiratorial agreement." (*See* Mem. Supp. HII and HC's Mot. in Limine to Exclude Evidence [557] at 6.) As a matter of logic, meetings and conversations during which the parties reach agreement cannot logically be considered acts in furtherance of that agreement. Furthermore, the "meetings, conversations, [and] other alleged 'conspiratorial' conduct" that defendants sought to exclude were not necessarily "overt acts" as contemplated by *Fisher*. *Fisher's* analysis rested on the Court of Appeals' holding in *Lawrence* that "the statute of limitations in a civil damages action for conspiracy runs separately from each overt act *that is alleged to cause damage* to the plaintiff." 665 F.2d at 1324 (emphasis added). Lawrence, itself, does not delimit the evidence a civil conspiracy plaintiff may use for particular purposes but rather the conspiracy-generated injuries for which a plaintiff may recover. *See id. Accord Scherer v. Balkema*, 840 F.2d 437, 439-40 (7th Cir. 1988) (setting forth rationale for confining civil conspiracy plaintiff's recovery to injuries caused by overt acts within the limitations period). To the extent *Fisher* imposes evidentiary limitations, its references to "overt acts" can reasonably be read to mean "overt acts that [are] alleged to [have] cause[d] damage." *See Fisher*, 180 F. Supp. 2d at 195; *Lawrence*, 665 F.2d at 1324. This is so because evidence of such acts transpiring outside the limitations period is irrelevant: under *Lawrence*, the plaintiff cannot recover for the injuries they caused. *See Fisher*, 180 F. Supp. 2d at 195 (rejecting as contrary to *Lawrence* relator's position that overt acts occurring prior to the limitations date "are relevant as part of a continuing violation

acts occurring prior to the limitations date cannot be used for this quite distinct purpose. Furthermore, given that defendants' pre-trial motion sought to exclude evidence of "meetings, conversations, or other alleged 'conspiratorial' conduct that occurred prior to June 30, 1989" only insofar as it was used "for the purpose of proving an underlying conspiratorial agreement," (*see* Mem. Supp. HII and HC's Mot. in Limine to Exclude Evidence [557] at 5, 6), they have waived any objection to its introduction for other purposes. Consequently, to the extent they rest on statute of limitations grounds, defendants' renewed motions for judgment as a matter of law shall be DENIED.

To the extent defendants raise any ground for judgment as a matter of law not herein addressed, their motions shall be, likewise, DENIED.

IV. Motions for Remittitur or Other Relief

A. Anderson's Liability

Hedging his bets, Anderson also seeks to lessen the sum he owes by several methods: he seeks remittitur, a complete or partial offset based on payments by settling co-defendants, and/or a reduction in the assessed statutory penalty.[140]

1. Remittitur

Contending the jury assessed excessive damages against him, Anderson asks this Court to follow the

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theory"). Evidence of *other* overt acts will not necessarily pose the same relevancy problem.

[140] Anderson also asks the Court to modify the Judgment to reflect that he is not liable for the relator's attorneys' fees and costs. (Motion One at 33.) The Court will address this argument in its Opinion on relator's motion for fees.

process described in *Nyman v. FDIC*, 967 F. Supp. 1562 (D.D.C. 1997) (Urbina, J.). (Motion One at 18-23.) If the Court finds the verdict amount to be excessive, he asks that it "order a new trial limited to the issue of damages," or "[i]n the alternative . . . grant the motion for a remittitur by conditioning the denial of a motion for a new trial on the plaintiff's acceptance of the reduced damage award." 967 F. Supp. at 1573.

In this Circuit, courts "only require remittitur when (1) the verdict is beyond all reason, so as to shock the conscience, or (2) the verdict is so inordinately large as to obviously exceed the maximum limit of a reasonable range within which the jury may properly operate." *Peyton v. DiMario*, 287 F.3d 1121, 1126 (D.C. Cir. 2002). Here, the jury found Anderson liable in the amount of $46,538.40, for claim 56 on Contract 29. (Verdict Form [858] at 11.)

While the Court can conceive of cases in which a $46,538.40 verdict might "shock the conscience," Anderson's is simply not one of them. Conceding as much, he acknowledges the award was not excessive in an absolute sense, but he nonetheless insists it is inordinately large when considered in relation to the jury's overall damages award on Contract 29, $3.4 million. (Motion One at 19.) He notes that while $3.4 million is equal to only 2.5% of the total value of all claims submitted on Contract 29, $46,538.40 is equal to 60% of the total value of claim 56. (*Id.* at 20.) Anderson suggests that his liability should more appropriately have been 2.5% of the value of claim 56, or $1,956.16. (*Id.* & n.9.) But the jury need not have found that the premium paid by the government on Contract 29 was distributed evenly across all 56 false claims.

Further, caught up in his calculations, Anderson forgets to tether his argument to the damages measure applied in this case: "the difference between what the United States paid and what it would have paid had there been no bid-rigging agreement." (May 4, 2007 AM Tr. at 65 (final jury instruction).) Where, as here, "the defendant by his own wrong has prevented a [] precise computation" of this difference, the jury "may make a just and reasonable estimate of the damage based on relevant data." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Based on the information in Plaintiff's Exhibit 648 and on other relevant data, the jury were entitled to make a "just and reasonable estimate" of the premium paid by the government on claim 56, for which Anderson would be jointly and severally liable with the other defendants.[141]

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[141] Seeking a new trial, Anderson contends the jury calculated damages based on HII's 60% share in the Harbert-Jones joint venture that bid on Contract 29. (*See* Motion One at 20.) This is pure speculation.

> In reviewing the amount of the jury's award, [the court] need not—and indeed cannot—reconstruct the precise mathematical formula that the jury adopted. Nor need [it] explore every possible quantitative analysis or compute the basis of every penny and dollar in the award. [Its] inquiry ends once [it is] satisfied that the award is within a reasonable range and that the jury did not engage in speculation or improper activity.

Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1239 (D.C. Cir. 1984). The law simply does not permit a court to hypothesize as to how the jury must have calculated specific awards. And as explained above, the jury followed the proper damages measure in reaching a just and reasonable estimate of "the difference between what the United States paid and what it would have paid had there been no bid-rigging agreement." Anderson's motion for a new trial on this ground shall be DENIED.

Anderson offers nothing beyond his "2.5%" argument to persuade the Court that $46,538.40 is an unreasonable sum, and objectively, it does not appear so. The total value of claim 56 was $77,564, and the damages award does not exceed this value. Because the damages award against him was neither beyond all reason nor inordinately large, the Court finds Anderson has demonstrated no basis for a remittitur order. In this regard, his motion shall be DENIED.

2. Set-Off

Anderson next protests that alone among the defendants, he received no credit for amounts the government obtained from settling co-defendants, and he contends these settlement payments entirely, or at least proportionately, offset his liability. (Motion One at 23-33.) In the Memorandum Opinion accompanying its Judgment, this Court adopted *McDermott, Inc. v. Amclyde's* proportionate share approach in denying Anderson a set-off. (Mem. Op. [882] at 4-7.) This was error. Because Anderson shared joint and several liability with the other defendants as to the government's damages on claim 56, he was entitled to a proportionate credit.

As the Court acknowledged in a prior opinion in this case, contribution and indemnification are unavailable among joint tortfeasors under the False Claims Act. *United States ex rel. Miller v. Bill Harbert Int'l Construction, Inc.*, 505 F. Supp. 2d 20, 26 (D.D.C. 2007) (collecting cases). Nonetheless, "when a plaintiff receives a settlement from one defendant, a nonsettling defendant is entitled to a credit of the settlement amount against any judgment obtained by the plaintiff against the nonsettling defendant as long as both the settlement and judgment represent common damages." *Singer v. Olympia Brewing Co.*,

878 F.2d 596, 600 (2d Cir. 1989), cert. denied, 493 U.S. 1024 (1990). *See also United States v. Zan Mach. Co.*, 803 F. Supp. 620, 623 (E.D.N.Y. 1992) (applying this rule in FCA case).

When this Court entered Judgment, the United States had received a total of $13.7 million from settling co-defendants.[142] Although at trial the jury calculated the government's damages as to each of the three contracts, the earlier settlement payments were not allocated among the three contracts but were structured as undivided, lump sums. For HC, HII, BHIC, and Bilhar, with whom the settling co-defendants shared joint and several liability as to all three contracts, the settlement payments and judgment represented "common damages." Hence, a simple, pro tanto credit against their overall liability would have been appropriate.[143] *See Zan Mach. Co.*,

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[142] The government had received $3.2 million from Bilfinger & Berger, $500,000 from AICI, and $10 million from ABB SUSA. (Mem. Op. of Aug. 10, 2007 [882] at 3.)

[143] In *McDermott*, the Supreme Court debated the merits of two approaches before adopting the proportionate share rule for admiralty cases. 511 U.S. at 208-217 (citing Restatement (Second) of Torts § 886A (1977)). While it ultimately deemed the *pro tanto* rule without contribution inferior, it found "arguments for the two approaches [were] closely matched," and its choice rested largely on the proportionate share rule's consistency with its earlier decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), another admiralty case. 511 U.S. at 217.

Lower court decisions since *McDermott* emphasize that this same outcome need not result in all other, non-admiralty contexts, and that the pro tanto rule without contribution remains a viable alternative. *See Am. Cyanamid v. Capuano*, 381 F. 3d 6, 20-21 (1st Cir. 2004) (noting that CERCLA does not dictate partial settlement's impact on contribution rights among joint wrongdoers but allows district court to choose among various approaches); *Schadel v. Iowa Interstate R.R., Ltd.*, 381 F.3d 671,

803 F. Supp. at 623. For HUK and Anderson, however, with whom the settling co-defendants shared joint and several liability only as to one contract and one claim, respectively, this was not the case. Because the $13.7 million in settlement payments embraced items of damages for which HUK and Anderson were not liable, they were not entitled to credits of the full amount.[144]

At the most elemental level, *McDermott* and its predecessor, *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), rest on notions of fairness and proportionality. *See* 511 U.S. at 208, 217 (proportionate share approach prevails due to its "consistency

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678 (7th Cir. 2004) (approving *pro tanto* approach in FELA case); *Fluck v. Blevins*, 969 F. Supp. 1231, 1237 (D. Or. 1997) ("choice of the proportionate liability method in *McDermott* does not necessarily mean that the Court would adopt that method for crediting a partial settlement in a securities case").

[144] The law disfavors double recovery as unjust enrichment, so "a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator." *See Zenith Radio Corp. v. Hazeltine Research*, Inc., 401 U.S. 321, 348 (1971). To effectuate this rule, a non-settling defendant is entitled to offset his liability based on amounts received from settling joint wrongdoers, but only to the extent those settlement payments relate to the same item(s) of damages. Logically, a defendant cannot offset his liability based on compensatory payments for harms for which he bears no responsibility. Thus, here, HUK merited a credit based on the portion of the $13.7 million aggregate that redressed the government's damages on Contract 20A, and Anderson deserved a credit in the amount attributable to the government's damages on claim 56 of Contract 29. This conclusion comports with the motivating rationale in another case discussed in this Court's Memorandum Opinion—namely, the avoidance of unjust enrichment. *See Rose v. Associated Anesthesiologists*, 501 F.2d 806 (D.C. Cir. 1974).

with *Reliable Transfer*," which itself adopted proportionate fault rule based on "interest in fairness"). In keeping with these principles, this Court held that in calculating offsets, "the $13.7 million must be allocated in the manner in which the jury apportioned liability across each of the three contracts." (Mem. Op. [882] at 10.) The Court calculated the portions of that aggregate value applicable to each contract accordingly.[145]

It now follows the same procedure in calculating the portion applicable to claim 56 of Contract 29: the jury found the government's damages on claim 56 to be $46,538.40, (*see* Verdict Form [858] at 11), which accounts for 0.1355% of the government's total damages. Applying this proportion to the total settlement payment value, $18,563.50 of the $13.7 million served to compensate the government as to claim 56. Anderson was entitled to a credit in this amount, which reduces his total liability from $149,615.20 to $131,051.70.[146]

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[145] The jury determined the government suffered damages of $29,920,000.00 on Contract 20A; $3,400,000.00 on Contract 29; and $1,026,029.22 on Contract 07. (Verdict Form [858] at 9, 10, 12.) Thus, Contract 20A accounted for 87.11% of the government's total damages, Contract 29 for 9.899%, and Contract 07 for 2.987%. (Mem. Op. [882] at 10.) The Court applied the jury's proportions to the total settlement payment value and found that of the $13.7 million, $11,934,546 applied to Contract 20A; $1,356,200 to Contract 29; and $409,234 to Contract 07. (*Id.*)

[146] The credit applies to Anderson's trebled liability of $139,615.20. *United States v. Bornstein*, 423 U.S. 303, 316-17 (1976) ("[I]n computing the [] damages authorized by the [FCA], the Government's actual damages are to be doubled before any subtractions are made for compensatory payments previously received by the Government from any source."). Incorporating

To the extent Anderson's motion seeks amendment of the Judgment to afford him a proportionate credit based on payments the government received from settling co-defendants, his motion shall be GRANTED, and the Judgment [883] shall be amended to reflect his post-credit liability of $131,051.70.

B. Statutory Penalty

Finally, defendants protest the Court's assessment of the maximum statutory per claim penalty against each of them. (Motion One at 33-39; Motion Seven at 6-13.)

A defendant found liable for violating the FCA must pay a mandatory civil penalty to the United States "of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U. S.C. § 3729(a) (2008). The trial court enjoys considerable discretion in setting a penalty amount within the prescribed range. *See Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003). Broadly, the penalty's twin purposes are punishment and deterrence.[147] *See, e.g., United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001) (analyzing sanction under Excessive Fines Clause). As this

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the $18,563.50 credit, and the $10,000 statutory penalty reduces this amount to $131,051.70.

[147] Defendants plaintively offer that they will almost certainly never engage in bid-rigging or similar wrongful conduct in future. (*See* Motion One at 35 n.18; Motion Seven at 13.) Even if these defendants have learned their lesson, the penalty's deterrence purpose is broader: the Court hoped the $10,000 per claim statutory penalty it imposed in this case would serve as a "deterrent to future conduct from entities in similar situations," not the deterrent to these defendants. (*See* Mem. Op. of Aug. 10, 2007 [882] at 9.)

Court explained in the Memorandum Opinion accompanying its Judgment, however, no statutory standard or judicially defined set of criteria governs this discretionary assessment. (Mem. Op. of Aug. 10, 2007 [882] at 8.) The Court thus considered "the totality of the circumstances, including such factors as the seriousness of the misconduct, the *scienter* of the defendants, and the amount of damages suffered by the United States as a result of the misconduct."[148] (*Id.*)

BHIC and HUK find fault with the Court's discretionary assessment, but their arguments amount to an assault on the sufficiency of the evidence, which the Court has already addressed at length.[149] The Court reaffirms its original analysis

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[148] Other courts had utilized these factors. *See Hays v. Hoffman*, 325 F.3d 982, 994 (8th Cir. 2003) (factoring seriousness of misconduct and harm caused by the misconduct into civil penalty calculation); *United States v. Rogan*, 459 F. Supp. 2d 692, 727 (N.D. Ill. 2006) (same); *Ervin*, 370 F. Supp. 2d at 50 (considering wrongdoers' *scienter* in calculating civil penalty).

[149] For example, defendants find fault with the Court's observations that: "Anderson was present at, and participated in meetings at which the rigging of bids was discussed and agreed upon[,] . . . [and] as managing partner of the Harbert Jones Joint Venture, submitted tenders on the contracts at issue to the government, with the knowledge of the bid-rigging conspiracy[;]" and Bill Harbert, who "held various ownership and officer positions at the various corporate entities involved in the bid-rigging conspiracy," possessed the requisite knowledge thereof. (Mem. Op. [882] at 9.) The Court has already extensively canvassed both men's intimate involvement in the conspiracy. *See supra* part III.A.

Defendants also challenge the Court's consideration of their efforts to cover up their scheme. (Mem. Op. of Aug. 10, 2007 [882] at 8-9.) Yet the jury heard evidence of—for example—a fraudulent "sale-leaseback" transaction that raised the Harbert-

and finds a $10,000 per claim statutory penalty was entirely appropriate.

Anderson offers several additional arguments of his own. In a footnote, this Court cited *United States v. Murphy*, 937 F.2d 1032, 1035-36 (6th Cir. 1991), as standing for the proposition that "the involvement of a defendant in bid-rigging is sufficient to impose the maximum $10,000 civil penalty under the FCA." (Mem. Op. of Aug. 10, 2007 [882] at 8 n.6.) Hoping to distinguish *Murphy*, Anderson points out that the defendants there were repeat offenders. *See Murphy*, 937 F.2d at 1036. But Anderson, too, participated in

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Jones joint venture's apparent costs on Contract 20A (and consequently, lowered its apparent profits) by $10.4 million. (Joint Stipulation 1.) They also heard testimony that the joint venture hid an additional $6 million in profits on Contract 20A by funneling them first to Contract 27, and then to Contract 33A, on the false premise that these projects would ultimately incur expenses attributable to Contract 20A. (Apr. 10, 2007 AM Tr. at 84-89.)

Defendants propose an alternative explanation for each suspicious practice. (*See* Motion Seven at 10-12.) They assert that Bill Harbert designed the sale-leaseback transaction to depress HII's value and to create a pool of funds from which he could subsequently purchase an interest in HII at a bargain price. (Motion Seven at 10.) But the "unanimous testimony" they cite consists of single-source hearsay, and they ignore that this transaction ultimately lined Jones' pockets as well as Harbert's. (*See* Mar. 27, 2007 PM Tr. at 88-89; Mar. 28, 2007 PM Tr. at 107; Mar. 29, 2007 PM Tr. at 17-18; Joint Stipulation 1.) Further, they characterize their "cost-shifting" among various contracts as legitimate. (Motion Seven at 10-11.) But as testimony at trial established, because the costs were never actually incurred, the joint venture ought then to have amended Contract 20A's books accordingly. (Apr. 10, 2007 AM Tr. at 84-89.) Particularly considered in light of the other evidence of bid-rigging on Contract 20A, the Court, like the jury, found defendants' explanations implausible.

bid-rigging more than once: thanks to the statute of limitations, he faced liability here only as to Contract 29, but he was also intimately involved in subverting the bidding process on Contract 20A. As factors in mitigation, Anderson notes that he has already paid a $25,000 criminal penalty and that his bid-rigging activities did not bring him personal riches. (Motion One at 34-35.) The first point ignores Congress's intent. It is beyond question that Congress may impose both a criminal and a civil sanction for the same conduct, *United States ex re. Marcus v. Hess*, 317 U.S. 537, 549 (1943) (citing *Helvering v. Mitchell*, 303 U.S. 391 (1938)), and Congress has done so for collusive conspiracies on U.S. government contracts, which subject the participants to both criminal liability under the Sherman Act and civil liability under the FCA, see 15 U.S.C. § 1 (2008); 31 U.S.C. § 3729 (2008). The second point rests on a faulty premise. Anderson characterizes his income as "relatively modest" and claims he possesses limited resources. Yet a salary of $160,000 per year, in 1991, is not, in this Court's view, mere peanuts. Hence, none of Anderson's arguments persuades the Court that he merits a lesser penalty.[150]

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[150] Defendant Anderson suffers from Alzheimer's, a cruel and debilitating disease, and the Court is not without compassion for his plight. Yet as the Court recounted in its Memorandum Opinion, Anderson's actions lay at the heart of the conspiracy:

> Defendant Anderson was present at, and participated in meetings at which the rigging of bids was discussed and agreed upon. Moreover, defendant Anderson, as managing director of the Harbert Jones Joint Venture, submitted tenders on the contracts at issue to the government, with the knowledge of the bid-rigging conspiracy.

(Mem. Op. of Aug. 10, 2007 [882] at 9.) His present condition in no way mitigates the egregiousness of his former conduct.

To the extent they seek amendment of the Judgment to impose a lesser statutory penalty, defendants' motions must be DENIED. Further, to the extent defendants' motions seek vacation, alteration, or amendment on any basis not already addressed, they shall be DENIED.

V. Conclusion

A casual glance at defendants' voluminous post-trial filings might leave one with the impression that their trial was riddled with errors, and that the deck was stacked against them. This would be a mistake. This Court has overseen defendants' case for only three of its now-thirteen years, but as expressed in this Opinion, its meticulous review of its own legal rulings and of the jury's verdict has led it to the inexorable conclusion that our judicial system afforded these defendants a fair shake. For the reasons set forth above, the Court resolves defendants' post-trial motions as follows:

(1) Anderson's Post-Judgment Motion [893] ("Motion One") shall be GRANTED in part and DENIED in part. To the extent Anderson's motion seeks amendment of the Judgment to afford him a proportionate credit based on payments the government received from settling co-defendants, his motion shall be GRANTED, and the Judgment [883] shall be amended to reflect his post-credit liability of $131,051.70. In all other respects, his motion shall be DENIED;

(2) HII's Motion for Judgment as a Matter of Law [894] ("Motion Two") shall be DENIED;

(3) HC's Motion for Judgment as a Matter of Law [895] ("Motion Three") shall be DENIED;

(4) BHIC and HUK's Motion for Judgment as a Matter of Law [896] ("Motion Four") shall be DENIED;

(5) HII and HC's Motion for a New Trial as to All Claims [897] ("Motion Five") shall be DENIED;

(6) Bilhar's Motion for Post-Trial Judgment as a Matter of Law, or in the Alternative, for a New Trial [898] ("Motion Six") shall be DENIED;

(7) BHIC and HUK's Motion to Alter, Amend, or Vacate the Judgment [899, 901] ("Motion Seven") shall be DENIED; and

(8) BHIC and HUK's Motion for New Trial [900, 904] ("Motion Eight") shall be DENIED.

A separate order shall issue this date.

Signed by Royce C. Lamberth, Chief Judge, June 23, 2008.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-1231 (RCL)

UNITED STATES OF AMERICA, *ex rel.*
RICHARD F. MILLER,
Plaintiffs,

v.

BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

This Memorandum Opinion confirms and explains the Orders issued by this Court during the April 27, 2007, hearing concerning defendants Bill L. Harbert ("Harbert") and E. Roy Anderson's ("Anderson") motions for judgments as a matter of law on statute of limitations grounds, except as to one false claim against Anderson relating to contract 29.

Relator filed his original complaint under seal on June 30, 1995, alleging an overarching conspiracy to rig bids on USAID contracts for construction programs in Egypt in violation of the False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq.* (2007). The extent of this complaint was limited to claims on contract 20A. Neither defendant Harbert nor defendant Anderson was named in this iteration of the complaint. Over five years later, on December 28, 2000,

the relator filed his Second Amended Complaint against the defendants, including for the first time, defendants Anderson and Harbert. As with the relator's first complaint, the relator's Second Amended Complaint only specified claims arising out of contract 20A. Shortly thereafter, on March 13, 2001, the government filed its Complaint in Intervention against all of the defendants listed in the relator's Second Amended Complaint, including Anderson, but *not including* defendant Harbert. Unlike the relator's Second Amended Complaint, the government's Complaint in Intervention included claims arising out of all three contracts at issue in this case: contracts 20A, 29, and 07. The relator did not include claims arising out of either contract 29 or 07 until March 9, 2006, when the relator filed his Third Amended Complaint.

Prior to the commencement of trial, defendants Harbert and Anderson moved to dismiss as time-barred plaintiffs' causes of action against them, pursuant to § 3731 of the FCA. Under this section:

> [a] civil action under section 3730 may not be brought: (1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.[1]

In response to the defendants' motions, this Court issued a series of pretrial Opinions addressing the

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[1] 31 U.S.C. § 3731.

propriety of the claims against both defendants under each statute of limitations provision.

Specifically, this Court found that, if the six-year limitations period under the FCA were to apply, the relator's claims against defendants Anderson and Harbert as to all three contracts at issue would be barred completely due to the fact that the relator's claims against both Anderson and Harbert were brought more than six years after the FCA violations occurred on contract 20A. For the same reason, all but one of the government's claims against defendant Anderson[2] would be time-barred under the six-year limitations period.[3]

Relying on its decision in *United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 474 F. Supp. 2d 75 (D.D.C. Feb. 7, 2007) (Lamberth, J.), however, this Court noted that the three-year alternate statute of limitations under § 3731(b)(2) applied to the government and relator alike. *See id.* at 89. Accordingly, the Court indicated that the relator and government's claims against Harbert and Anderson could be deemed timely if the evidence showed that the plaintiffs' respective claims were filed within three years of the point in time the government knew or should have known of facts material to the cause of action against Harbert and Anderson. If the evidence demonstrated that the government knew or reasona-

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[2] This is a single claim on contract 29, which is the only FCA claim that occurred within six years of the date the government's Complaint in Intervention against Anderson was filed.

[3] The government did not bring any claims against defendant Harbert. Therefore, though defendant Anderson's motion for judgment as a matter of law extends to both the relator and the government, defendant Harbert's similar motion extends only to claims brought by the relator.

bly should have known facts material to the right of action against Harbert and Anderson more than three years prior to December 28, 2000 when the relator's complaint was filed,[4] however, then the

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[4] The timeliness of the plaintiffs' complaints under the three-year limitations period set forth in § 3731(b)(2) is measured from the date of the relator's complaint due to the fact that a government's complaint in intervention is deemed to be an amendment of the relator's complaint, if the elements of relation back under Rule 15(c) of the Federal Rules of Civil Procedure are satisfied. Therefore, the government's complaint against Anderson, *qua* amended pleading, may relate back to the relator's Second Amended Complaint against Anderson provided that the government's complaint arises out of the same conduct and occurrences as the conduct set forth in the relator's Second Amended Complaint, and provided that the relator's Second Amended Complaint is timely filed under the three-year limitations period. As this Court has previously held, the government's Complaint in Intervention in this case averred claims against Anderson arising out of the same conduct and occurrences as those claims in the relator's Second Amended Complaint, and sought remedy against the same defendant (Anderson). Additionally, many of the FCA claims on contract 20A brought by the relator against Anderson fall within the ten year window allowed under § 3731(b)(2). Therefore, the Court finds that the government's claims as to defendant Anderson relate back to the date the original claims against Anderson were filed: December 28, 2000. Therefore, the government's knowledge must be measured from three years prior to this same date.

Under the six-year limitations period, however, the government would not be able to relate back to the relator's Second Amended Complaint because the claims against Anderson in the relator's Second Amended Complaint would be untimely under § 3731(b)(1), and an amended pleading may not relate back to an untimely original pleading. As § 3731(b)(1) points out, the six-year period is measured from the time of the violation of the FCA, rather than the government's knowledge of the violation. *See* 31 U.S.C. § 3731(b)(1). Therefore, only those violations that occurred within six years of the filing date of the complaint may be timely brought. Here, the relator's claims against Anderson

plaintiffs could not take advantage of the three-year provision under § 3731(b)(2), and their claims would be measured under the six-year provision under § 3731(b)(1).

On April 27, 2007, this Court conducted a hearing out of the presence of the jury to determine when, as a matter of law, the government knew or reasonably should have known facts material to the cause of action brought by plaintiffs.[5] At the hearing, this Court GRANTED defendants Harbert and Anderson's motions for judgment as a matter of law on statute of limitations grounds, and ORDERED that all claims against defendant Bill Harbert be DISMISSED, and that all claims except the final claim on contract 29 against Roy Anderson be DISMISSED

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extended only to contract 20A, of which the last violation occurred more than six years prior to the relator's filing the Second Amended Complaint. Accordingly, the timeliness of the government's Complaint in Intervention under the six-year limitations period in § 3731(b)(1), if it is found to apply, must be measured by the date the government's Complaint in Intervention was filed: March 13, 2001.

[5] Defendant Harbert, with the concurrence of defendant Anderson, proposed at the pretrial conference and again during a colloquy after the jury had been excused for the day that the statute of limitations issue be heard by the Court instead of the jury. (*See* Trial Tr. 49, Mar. 9, 2007; Trial Tr. 142-45, Apr. 13, 2007 P.M.) In response, plaintiffs indicated, both in open court and in a Statement [795] filed with the Court, that they were willing to waive their jury trial right to the extent necessary to permit the Court to resolve the statute of limitations issue as to defendants Harbert and Anderson. (*See* Statement [795] at 1-2; Trial Tr. 95, Apr. 17, 2007.) Though plaintiffs objected to the portion of the defendants' proposal that the jury resolve the issue if the Court were to find against the defendants, this objection is rendered moot by the fact that the Court found in favor of the defendants on the statute of limitations issue.

on the grounds that the government reasonably should have known facts material to the cause of action prior to December 28, 1997, and that no rational jury could find otherwise. The Court's analysis in support of its decision follows.

II. ANALYSIS

A. STANDARD OF REVIEW

"If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law against the party on that claim or defense . . . ." Fed. R. Civ. P. 50(a)(1)(B). A party is entitled to a judgment as a matter of law in its favor only if "no reasonable jury could reach a verdict" in the opposing party's favor. *Holbrook v. Reno*, 196 F.3d 255, 259 (D. C. Cir. 1999). In resolving a motion for a judgment as a matter of law, a court must "view the evidence in the light most favorable" to the non-moving party, and must "resolve all conflicts in [the non-moving party's] favor." *Id.* at 259-60. A court should not direct a judgment as a matter of law in favor of a party if reasonable minds might differ as to the import of the evidence presented before the court. *Borgo v. Goldin*, 204 F.3d 251, 254 (D.C. Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)).

B. ANALYSIS

1. Purpose and Rules of Interpretation of Statutes of Limitations

Throughout this Court's determination of whether the government should have known of facts material

to the right of action, it is important to keep in mind both the purpose behind, and the methodology in interpreting, statutes of limitations. As the Supreme Court has held, statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Tels. v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)). Statutes of limitations are designed to "afford[ ] plaintiffs what the legislature deems a reasonable time to present their claims [while simultaneously] protecting defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. at 117 (citing, *inter alia*, *United States v. Marion*, 404 U.S. 307, 322, n.14 (1971)). Accordingly, courts "are not free to construe [a statute of limitations] so as to defeat its obvious purpose, *which is to encourage the prompt presentation of claims.*" *Kubrick*, 444 U.S. at 117 (emphasis added).

2. Section 3731(b)(2) Analysis

The relevant issue before this Court is whether, applying the three-year statute of limitations under § 3731(b)(2) of the FCA, the plaintiffs' claims against defendants Harbert and Anderson were timely. The timeliness of a plaintiff's complaint under § 3731(b)(2) of the FCA depends upon a determination of *when* the fraud at issue was known or reasonably should have been known. *See United States v. Intrados/Intl. Mgmt. Group*, 265 F. Supp. 2d 1, 12 (D.D.C. 2002)

(Urbina, J.). Though this Court has previously found that a relator may take advantage of the three-year period under § 3731(b)(2), the statute of limitations under that section begins to run from the point in time *the government* knew or reasonably should have known of facts material to the right of action. *Cf. Pogue*, 474 F. Supp. 2d at 85 ("[31 U.S.C. § 3731](b)(2)'s three-year statute of limitations applies across the board, measured *by the government's knowledge*.") (emphasis added). Therefore, this Court must determine whether no reasonable jury could find that the government reasonably should not have known facts material to the right of action prior to December 28, 1997.[6]

In making the determination of whether a plaintiff–in this case, the government–"should have known" facts material to the right of action based in fraud for purposes of measuring when a statute of limitations begins to run, courts have repeatedly applied a "discovery-due diligence" standard, which is rooted in principles of equitable tolling. *See, e.g.*, *Sprint Commc'ns. Co. v. Fed. Commc'ns. Comm'n*, 76 F.3d 1221 (D.C. Cir. 1995); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989); *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981); *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977).[7] Under the

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[6] *See supra* note 4. Obviously, this issue is being decided upon the defendants' Rule 50 motions for judgment as a matter of law. In order to determine what no reasonable jury could find, however, this Court must first inquire as to whether the government reasonably should have known of the material facts, and then assess whether no reasonable jury could find otherwise.

[7] Though these cited cases are based on claims arising under the Federal Tort Claims Act ("FTCA"), courts have consistently interpreted the "should have known" standard under both the

"discovery-due diligence" standard, the running of the statute of limitations does not begin at the point the plaintiff has sufficient information to prevail at

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FCA and FTCA identically in light of the common intent and nearly identical language under both statutes. *See, e.g.*, *United States ex rel. Purcell v. MWI Corp.*, 254 F. Supp. 2d 69, 77 (D.D.C. 2003) (Urbina, J.) (analyzing section 3731(b)(2) and 2416(c) together for the purposes of resolving a motion to dismiss); *United States v. Tech Refrigeration*, 143 F. Supp. 2d 1006, 1010 (N.D. Ill. 200 1) (analyzing a section 3731(b)(2) claim by reference to section 2416(c)); *United States v. Kensington Hosp.*, 1993 WL 21446, at * 13 (E.D. Pa. 1993) (describing the common intent behind sections 3731(b)(2) and 2416(c)); *Compare* 28 U.S.C. § 2416 ("For the purpose of computing the limitations periods . . . , there shall be excluded all periods during which . . . facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances . . . ."), *with* 31 U.S.C. § 3731(b)(2) ("A civil action . . . may not be brought . . . more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed . . . .") Moreover, two judges within this district have found that the tenets of the "discovery-due diligence" standard apply to statute of limitations issues arising under the FCA. *Cf. United States v. Intrados/Intl. Mgmt. Group*, 265 F. Supp. 2d 1, 12 (D.D.C. 2002) (Urbina, J.) (finding that the "should have known" standard under § 3731(b)(2), much like the equitable tolling doctrine, "assumes the party charged with the responsibility of uncovering the fraud will do so with due diligence"); *United States v. Uzzell*, 648 F. Supp. 1362, 1367 (D.D.C. 1986) (Green, J.) (finding that the principles of equitable tolling apply to statute of limitations determinations under § 3731 of the FCA). Accordingly, this Court finds that the reasoning applied to FTCA cases for the purposes of interpreting the "should have known" standard applies with equal force to the same standard found under § 3731(b)(2) of the FCA.

trial, or even when a plaintiff is aware that the conduct at issue is actionable under the law.[8] Rather, courts have consistently found that a limitations period begins to run under the "should have known" standard at the point in time that the government official charged with bringing the civil action "discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *See, e.g.*, *Sprint Commc'ns. Co. v. Fed. Commc'ns. Comm'n*, 76 F.3d 1221 (D.C. Cir. 1995); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989); *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981); *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977). That is, the limitations period starts to run on "the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress." *Loughlin v. United States*, 230 F. Supp. 2d 26, 40 (D.D.C. 2002) (quoting *Zeleznik*, 770 F.2d at 23 (3d Cir. 1985)).

In cases where defendants have not engaged in affirmative acts of fraudulent concealment, a plaintiff is deemed to have sufficient notice of critical facts to set the statute of limitations running if the plaintiff has inquiry notice of the injury and its cause. *Cf. Kubrick*, 444 U.S. at 120; *Cf. Sprint*, 76 F.3d at 1228 (citing *Riddell*, 866 F.2d at 1491). In such a case, a plaintiff "may not wait passively until evidence of actual injury surfaces." *Loughlin*, 230 F. Supp. 2d at 40. Rather, a plaintiff *must*, within the statutory period, "make a diligent inquiry into the facts and circumstances that would support that claim," so as

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[8] *See Kubrick*, 444 U.S. at 120-22 (finding that, the statute of limitations was triggered *prior to* the plaintiff's awareness of whether the defendant's conduct was actionable under the law).

to determine whether and whom to sue. *Sprint*, 76 F.3d at 38; *cf. Kubrick*, 444 U.S. at 122; *Davis v. United States*, 642 F.2d 328, 331 (9th Cir. 1981) (citing *Kubrick*, 444 U.S. 111 (1979)). Where no fraudulent concealment exists, a plaintiff's failure to exercise due diligence in discovering the material facts underlying the cause of action is fatal to those claims. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984).

In cases where the defendant has engaged in fraudulent concealment, however, the defendant must prove that the plaintiff had a higher degree of knowledge than inquiry notice of the fraud in order to prevail on a statute of limitations defense. *Riddell*, 866 F.2d at 1491. The defendant has the burden of "coming forward with any facts showing that the plaintiff could have discovered their involvement or the cause of action had [the plaintiff] exercised due diligence." *Richards v. Mileski*, 662 F.2d 65, 71 (D.C. Cir. 1981).

Accordingly, this Court must make three determinations. First, the Court must determine whether the defendants engaged in any fraudulent concealment of the injury.[9] Second, the Court must determine at what point the government was on notice of the injury alleged in the complaint. Third, if the plaintiff is deemed to have been on notice, the Court must determine whether the plaintiff exercised due diligence in conducting an inquiry into determining whether a cause of action existed.

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[9] As this inquiry sets the standard of knowledge of the injury for the government, the Court must conduct this inquiry first.

3. Fraudulent Concealment Analysis

Plaintiffs contend that Harbert and Anderson's activities in covering up their respective involvement in the alleged conspiracy constituted affirmative acts of fraudulent concealment. Accordingly, plaintiffs argue that, under principles of equitable tolling, the three-year statute of limitations should be tolled unless the defendants can establish that the government could have discovered the defendants' involvement by exercising due diligence. In plaintiffs' opinion, the fact that the criminal investigation undertaken by the Antitrust Division at the DOJ did not uncover direct evidence of the defendants' involvement in the conspiracy until 1999 is proof that the Civil Division would not have uncovered the fraud even if it had exercised due diligence. (*See* JML Hr'g Tr. 166, Apr. 27, 2007.) Accordingly, plaintiffs argue that the statute of limitations should be tolled until 1999, when the government uncovered more direct evidence of the defendants' involvement in the conspiracy. There are a number of problems with this argument.

First, plaintiffs' argument incorrectly interprets the fraudulent concealment standard. Under the law of this Circuit, "the doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." *Hobson* v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984). That is, the doctrine of fraudulent concealment will toll a statute of limitations only insofar as the injury to the plaintiff and its cause is concealed by the defendants. Once a plaintiff becomes aware of these two pieces of information, however, the clock begins to run for statute of limitations purposes. Neither a lack of

knowledge of the specific pattern of fraudulent activity, or an inability to know the particular identities of some of the perpetrators of the fraud alters this result. Moreover, "[t]he fact that a reasonably diligent investigation would not have discovered the defendant's involvement is no longer relevant for the purposes of accrual of the statute of limitations."[10] Therefore, the limitations period will only be tolled if the defendants' acts in concealing the fraud prevented the government from discovering that it had been injured by the alleged conspiracy.[11]

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[10] *Zeleznik v. United States*, 770 F.2d 20, 24 (3d Cir. 1985) (citing *Davis v. United States*, 642 F.2d 328 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982)).

[11] This finding is not inconsistent with the D.C. Circuit's finding in *Hobson* that "[a] plaintiff's knowledge of the grounds for a suit must generally extend to an awareness of the persons responsible for plaintiff's injury . . . [and that] simply because a person knows he has been injured by one person cannot reasonably mean he should be held to know of every other participant [in the fraud]." *Hobson*, 737 F.2d at 35. To the contrary, *Hobson* points out that this ruling "by no means impl[ies] that a plaintiff may postpone suit until he knows every defendant by name and title." *Id.* The *Hobson* Court noted that a plaintiff would be held to know of certain individuals' involvement in a fraudulent scheme based solely on their relationship to known perpetrators of the fraud. *See Hobson*, 737 F.2d at 35 n.109 (noting that a plaintiff "is held to know that subordinates might be implicated if their superiors are involved in a wrong," and would in turn be precluded from bringing a later suit against the subordinate after the statute of limitations has run); *see also Fitzgerald*, 553 F.2d at 229.

The facts in this case fall squarely within the standard set forth in *Hobson*. It is undisputed that the government knew in June 1995 that Messrs. Harbert and Anderson owned and/or controlled many of the companies that were named as defendants in this case by the relator. It is also undisputed that the acts of corporations are implemented and carried out by individuals. Based on the facts of this case, the relationships

Here, any reasonable jury would have to find that the government was directly aware of myriad pieces of evidence pointing to a scheme to defraud the United States government involving the submission of bids on multiple contracts for construction jobs in Egypt. The relator's Disclosure Statement very clearly lays out that a conspiracy existed to rig bids on USAID contracts in Egypt, and detailed the manner in which the conspiracy was acted out by its participants. (JML Hr'g Tr.15-18.)[12] The allegations within the relator's complaint also detailed similar information about the injury to the government and its cause. Both the Disclosure Statement and the Complaint were provided to the government in 1995. Accordingly, no reasonable jury could find that the government did not have knowledge of the injury from which this cause of action stems. Therefore, the three-year statute of limitations cannot be tolled on grounds of fraudulent concealment because the government was aware of the injury at the time the relator's Complaint and Disclosure Statement were filed in 1995.

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between Messrs. Harbert and Anderson and the corporate entities that were initially named as defendants were so intertwined that the Court finds that the government could not have been unaware that Messrs. Harbert and Anderson might be implicated if the many companies that they owned and operated were found to be involved in wrongdoing. Therefore, even under the *Hobson* standard, the government's knowledge of the grounds of the suit extends to an awareness of both Messrs. Anderson and Harbert, and the plaintiffs are not entitled to a postponement of the statute of limitations.

[12] Namely, the Disclosure Statement stated that the bids on Contract 20A were rigged, that the joint venture paid Fru-Con and B&B to submit complementary bids, and that AIC1 was paid not to bid so that the Harbert-Jones Joint Venture could win the bid. (JML Hr'g Tr.15-18.)

Second, even if limitations periods were able to be tolled due to concealment of an individual's particular involvement in a fraud, it is clear–and, consequently, no reasonable jury could find otherwise–that the government knew of defendants Harbert and Anderson's identities in association with the fraud in this case prior to December 28, 1997. In fact, at the time the relator filed his Disclosure Statement with the government in 1995, the government had in its possession–and had access to–information that pointed to defendants Anderson and Harbert as members of the conspiracy at issue. *See infra* Section II.B.4.a; *see also supra* note 11.

Accordingly, the Court finds that no reasonable jury could find that fraudulent concealment of the injury occurred. Therefore, the Court finds that the requisite level of knowledge of the injury that the defendants must prove the government had prior to December 28, 1997 is inquiry notice. That is, the defendants must prove the government had sufficient information that "would lead an ordinary prudent person to investigate the matter further." Black's Law Dictionary 1091 (8th ed. 2004).

4. Inquiry Notice Analysis

a. Government Had Inquiry Notice of Injury

Based upon the evidence presented at the hearing, it is clear that the government had inquiry notice of the injury and its cause. The relator's Complaint and Disclosure Statement filed with the government in June 1995 provided in detail the various pieces of evidence and allegations supporting a finding that the defendants engaged in a conspiracy to rig bids on USAID contracts in Egypt. In these documents, the relator named key participants, both individuals and

corporate entities, who allegedly participated in the fraudulent scheme. The relator also provided factual support in the form of exhibits and attachments to the Disclosure Statement that corroborated his allegations of wrongdoing toward the government.

In addition, the relator provided the government with ample evidence to put the government on inquiry notice that defendants Anderson and Harbert were likely involved in causing the injury to the government. For example, with respect to Mr. Anderson, Mr. Bell[13] admitted during his testimony that the relator referred to Anderson approximately a dozen times throughout the Disclosure Statement itself. (JML Hr'g Tr. 64.) Additionally, Mr. Bell acknowledged that the relator indicated in his Disclosure Statement the various leading roles Mr. Anderson played in running the companies charged in the conspiracy, including the facts that Mr. Anderson was president of Harbert UK, and was Harbert International, Inc.'s sponsor representative to the Harbert-Jones joint venture. (JML Hr'g Tr. 65.) In these capacities, the Disclosure Statement stated that Anderson "played a leading role in the organization and activities of the 'Frankfurt Club' of U.S. contractors qualified to do business in Egypt for construction projects. (JML Hr'g Tr. 65.) Perhaps most importantly, Mr. Bell testified that the relator *explicitly stated* in his Disclosure Statement that he considered Anderson a "central participant in the conspiracy," at one point calling him a "ringleader" in the conspiracy at issue. (JML Hr'g Tr. 64, 65.)

With respect to Mr. Harbert, the disclosure statement also clearly detailed Mr. Harbert's ownership

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[13] Mr. Robert Bell is counsel for the relator. (JML Hr'g Tr. 8.)

and high-level involvement in the various companies alleged to have participated in the fraud.[14] Mr. Harbert was also listed as a participant in the quarterly meeting in November 1990, at which questions were raised as to the propriety of pre-bid cost figures on contract 20A.[15] Additionally, the Disclosure Statement points out that Mr. Harbert had signed wire transfers of money to satisfy Holzmann invoices that "appeared to be false," and was responsible for approving and signing payments for "the most glaring example of a questionable transaction," namely the sale-leaseback transaction between the Joint Venture and Sabbia. (*Id.* at 20.) The Disclosure Statement also states that Bill Harbert signed an amendment to the Harbert-Jones Joint Venture agreement allowing each party to charge home office overhead to overseas projects; a process that "was not Jones Construction's general practice," and appeared to be "another means of reducing (by over $3 million) the profit margin on these contracts." (*Id.* at 22.) Even more, the relator provided to the government a copy of this agreement signed by Mr. Harbert, as an attachment to the Disclosure Statement. (*Id.* at 44.) Finally, the two most significant examples of Bill Harbert's involvement in the fraud that are detailed

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[14] Indeed, the very fact that many of these allegedly-participating companies bore Mr. Harbert's name can not be discounted in assessing Mr. Harbert's connection to the fraud at issue. Similarly, the significant financial windfall that Mr. Harbert stood to gain by virtue of his ownership of many of the companies that allegedly participated in this fraudulent scheme bears weight.

[15] Mr. Harbert's involvement in this meeting bears significance because the relator's Disclosure Statement lists this meeting as the catalyst for his discovery of the bid-rigging conspiracy. (*See* Disclosure Statement at 12.)

in the Disclosure Statement are: (1) Bill Harbert's efforts to conceal the conspiracy by ensuring the relator was not involved in future Joint Venture meetings after the relator had begun to question suspicious activities; and (2) rumors of Bill Harbert's promise to Alf Hill and Tommy Kitchens to make them millionaires for their participation in rigging contract 20A. (JML Hr'g Tr. 46-50.)

In total, the allegations presented to the government in June 1995 draw specific links between the defendants and the injurious conduct (the bid-rigging conspiracy). Therefore, it is clear that an ordinary prudent person presented with the information that the government had in its possession prior to December 28, 1997 regarding defendants Harbert and Anderson would have investigated the matter further to ascertain the level of their involvement in the bid-rigging conspiracy. An ordinary prudent person presented with this type of information would not have sat on their hands, as the government did in this case. Accordingly, the Court finds that no reasonable jury could find that the government did not have inquiry notice of both the injury caused by the alleged conspiracy, and the involvement in the fraud by defendants Harbert and Anderson.

b. Interaction Between Federal Rules of Civil Procedure and Limitations Period

Still, plaintiffs argue that these statements about defendants Harbert and Anderson are mere allegations that needed to be substantiated in order to justify filing a valid complaint under the Federal Rules of Civil Procedure. (JML Hr'g Tr. 80-81, 158-60.) They contend that there was no direct evidence of bid-rigging, and that some of the allegations within the Complaint and Disclosure Statement were based

on rumor and multiple levels of hearsay. (*Id.*) This level of evidence, plaintiffs argue, was insufficient to warrant the government's intervention and the filing of a complaint against defendants Harbert and Anderson. (*Id.*) Accordingly, plaintiffs argue that the statute of limitations could not begin to run until more substantial direct evidence of the bid-rigging conspiracy was uncovered; in this case, plaintiffs allege this occurred in 1999. (*Id.*)

Though plaintiffs are certainly correct that the requirements of particularity, and information and belief do dictate the sufficiency of information and allegations needed in order to file a valid complaint with the Court,[16] these pleading requirements are wholly inapposite to a statute of limitations discussion. Statutes of limitations are *not* open-ended guarantees that an injured party has whatever time it needs to bring a proper claim. Rather, statutes of limitations represent a "Congressional determination of a reasonable amount of time for injured parties to discover and make claims." *Zeleznik*, 770 F.2d at 24 (citing *Kubrick*, 444 U.S. at 117).

Accordingly, an injured party's satisfaction of these pleading requirements is not a trigger for the running of a limitations period, but is rather a procedural endgame that the injured party must reach before the limitations period expires. In other words, once the injured party is on notice that it has a claim, the injured party has the amount of time under the statute of limitations to attempt to bring a claim that satisfies the pleading requirements set forth in the Federal Rules of Civil Procedure. Here, the fact that the government felt it needed additional

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[16] *See* Fed. R. Civ. P. 9(b), 11(b)(3).

time to investigate the allegations averred in the relator's Disclosure Statement and Complaint before being able to file a proper complaint does not alter the point in time the limitations period began to run for claims brought against defendants Anderson and Harbert. Accordingly, the Court finds that the government had inquiry notice of the injury, at the latest, on or about August 4, 1995.[17]

5. Due Diligence Analysis

As Judge Green pointed out in *Uzzell*, "[t]he term 'discovered,' of course, assumes due diligence" on the part of the government official who is responsible for uncovering the material facts at issue. *Uzzell*, 648 F. Supp. at 1367. The exercise of due diligence by plaintiffs is necessary in order to prevent–and at the very least, to mitigate–the inequitable result of allowing the government "to bring an action whenever it had the inclination to discover the material facts." *Id.* (internal citations omitted). In fact, as the Supreme Court has noted, a party who fails to act diligently in uncovering material facts underlying the cause of action "cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Cen-*

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[17] This date correlates to the date the second set of attachments to the relator's Disclosure Statement was filed. As the Supreme Court has found, as a general rule a party is deemed to have notice of the contents of a document within the party's power and possession. *Cf. Livingston v. Maryland Ins. Co.*, 11 U.S. (7 Cranch) 506, 538 (1813). Therefore, the date upon which the government is deemed to have notice of the facts that are sufficient to give rise to inquiry notice of the injury and its cause must be calculated from the date the government received those facts. As the facts giving rise to inquiry notice were set forth in the relator's Complaint and Disclosure Statement with its attachments, the government's inquiry notice is measured from August 4, 1995.

ter v. Brown, 466 U.S. 147, 151 (1984). Therefore, tolling the statute of limitations is proper "unless the facts show that the plaintiff failed to exercise due diligence in discovering the material facts underlying his cause of action." *Richards v. Mileski*, 662 F.2d 65, 70-71 (D.C. Cir. 1981).

To determine whether a plaintiff properly exercised due diligence in uncovering a cause of action, a court must make "a fact-specific judgment in each case as to what the court expects a reasonable plaintiff to do in uncovering the elements of his claim." *Intrados*, 265 F. Supp. 2d at 11 (citing *Hohri v. United States*, 782 F.2d 227, 246 (D.C. Cir. 1986), *vacated and remanded on other grounds*, 482 U.S. 64 (1987)). A court must measure "the plaintiff's efforts to uncover his cause of action against what a reasonable person would have done in his situation given the same information." *Richards*, 662 F.2d at 71.

In this case, it is clear that the government attorneys did not exercise due diligence in attempting to uncover the material facts of the causes of action at issue in this case, and that the government's failure to act was unreasonable under the circumstances. The relator filed his first complaint on June 30, 1995. Along with his first complaint, the relator submitted a Disclosure Statement, also filed on June 30, 1995. (JML Hr'g Tr. 9.) The Disclosure Statement was provided to attorneys at the U.S. Department of Justice's ("DOJ") Antitrust Division and Civil Division. (JML Hr'g Tr. 26.) Inside this Disclosure Statement, the relator included "all material evidence and information" in his possession relating to the alleged conspiracy at issue. (JML Hr'g Tr. 62-63.) The Disclosure Statement also included a series of documents corroborating the facts, suspicions, allega-

tions and beliefs put forth by the relator therein. (JML Hr'g Tr. 19.) Later, on August 3, 1995, the relator submitted an additional set of documents to help corroborate the information and allegations within the Disclosure Statement. (*Id.*)[18] At the time the relator filed his Disclosure Statement, and Mr. Bell "thought we had a very good case to go forward, and [that] the Civil Division would be . . . ready to intervene." (JML Hr'g Tr. 71-72.)[19] Indeed, at the hearing, Ms. Mark confirmed Mr. Bell's position when she indicated that "presumably, upon the filing of the [relator's] complaint, the United States could have elected to intervene." (JML Hr'g Tr. 126.)

After the Disclosure Statement and both sets of documents were submitted, the relator met with government attorneys, including Ms. Mark from the Civil Division of the DOJ, Mr. Morgan from the U.S. Attorney's office (collectively the "Civil Attorneys"), and a number of attorneys from the Antitrust Division at the DOJ, including Bill Dillon (collectively the "Antitrust Attorneys"). (JML Hr'g Tr. 21.) In a "lengthy, all day meeting" that took place on

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[18] And yet, though these documents contained *all* material evidence and information relating to the bid-rigging conspiracy, Ms. Mark indicated that she only "more or less" reviewed these documents. (JML Hr'g Tr. 110-11.)

[19] In fact, Mr. Bell testified that he had a conversation with Ms. Mark before 1999–before two of the co-conspirators came forth and reached settlements with the government–in which he inquired as to why the Civil Attorneys had not intervened. (JML Hr'g Tr. 70.) In this conversation, Ms. Mark indicated to Mr. Bell that the government had not yet made a decision to intervene, and might not intervene at all. (*Id.*) This response from Ms. Mark, and indeed the entire pace of the Civil Attorneys' investigation of the relator's civil claims "jarred" Mr. Bell, and disappointed him. (JML Hr'g Tr. 72.)

approximately August 4, 1995, the relator and his counsel shared information with the government attorneys, both Criminal and Civil. (JML Hr'g Tr. 21-22, 67.)

And yet, over the course of the next *four years* after the meeting, the Civil Attorneys did virtually nothing to discover any material facts underlying the fraudulent conspiracy.[20] First, the Civil Attorneys did not make any attempts to obtain information from the ongoing criminal investigation into the matter conducted by the Antitrust Attorneys. For example, though OIG investigators used by the Civil Attorneys were conducting interviews and making inquiries into the case to assist the Antitrust Attorneys, the Civil Attorneys never saw or attempted to see the OIG investigation file at all. (JML Hr'g Tr. 95.) The Civil Attorneys also made no attempts whatsoever to review any of the OIG investigators' notes of the interviews. (JML Hr'g Tr. 93- 94.) In fact, the Civil Attorneys never made any attempt to determine who, if anyone, was interviewed by the OIG investigators. (JML Hr'g Tr. 103.) Nor did the Civil Attorneys ask the OIG agents, as a part of their investigation, to issue subpoenas to the companies participating in the bid-rigging conspiracy. (JML Hr'g Tr. 148-49.) In addition, the Civil Attorneys never reviewed or requested to review the file from the FBI's investigation into this matter. (JML Hr'g Tr. 109.) As if this

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[20] In fact, the only active involvement the Civil Attorneys appeared to have with this case was their regular correspondence with Mr. Bell every four to six months to discuss whether the plaintiffs should seek an extension of the period during which the relator's complaint remained sealed so that they could await the completion of the criminal investigation. (JML Hr'g Tr. 67- 68.)

were not enough, the Civil Attorneys never requested from the relator–at the time, a potential co-plaintiff in the civil action–that he provide the Civil Attorneys a copy of all the information given by the relator to the Antitrust Attorneys to assist in the investigation. (JML Hr'g Tr. 113.)[21]

Second, the Civil Attorneys made no attempts to investigate the bid-rigging allegations under their own efforts. The Civil Attorneys made no efforts to interview key individuals listed in the Complaint and Disclosure Statement to verify the allegations contained within those documents. For example, the Civil Attorneys never attempted to meet with either John Ollis, notwithstanding the fact that Mr. Ollis could have easily verified two of the most critical pieces of information tying Harbert and Anderson to the bid-rigging conspiracy, namely that: (1) Bill Harbert had requested that only he and Johnnie Jones attend the Joint Venture meetings after the relator had begun raising questions as to possible improprieties in the bid-rigging process; and (2) Roy Anderson admitted to Ollis that Philipp Holzmann, acting primarily through Peter Schmidt, had organized the "Frankfurt Club" of all the contractors to rig bids on USAID contracts in Egypt. (*See* JML Hr'g Tr. 48-49, 65-66.) Additionally, the Civil Attorneys never made attempts to follow up with either Alf Hill or Tommy Kitchens to verify the allegations that Bill Harbert promised to make Messrs. Hill and

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[21] The Civil Attorneys' failure to request information from the relator is particularly egregious in light of Ms. Mark's admission that there was no reason for their failure to ask, and Mr. Bell's statement that the relator would have had no problem with giving the Civil Attorneys all of the information the relator provided to the Antitrust Attorneys. (*See* JML Hr'g Tr. 22, 113.)

Kitchens millionaires for their roles in helping to rig the bid on contract 20A. (JML Hr'g Tr. 46-47.) Even if neither Mr. Hill or Mr. Kitchens were available, the government very easily could have obtained similar verification of this last allegation by discussing with the relator his involvement in a September 22, 1995 phone call with Mr. Kitchens, in which Mr. Kitchens informed the relator that Bill Harbert had not made good on the promise to make Kitchens and Hill millionaires, but was keeping both men "happy by keeping both . . . on the payroll." (JML Hr'g Tr. 31.)[22] Ironically, though the Civil Attorneys did nothing to verify these inculpatory allegations between June 1995 and December 1997, the plaintiffs point to these three pieces of information as being critical in their decisions to bring actions against defendants Anderson and Harbert. (JML Hr'g Tr. 50-56.)

As this evidence shows, from August 1995 until June 1999, the Civil Attorneys exercised no due diligence whatsoever. Put simply, the Civil Attorneys

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[22] The details of this conversation between the relator and Mr. Kitchens were transcribed by an FBI agent investigating the bid-rigging conspiracy on behalf of the Antitrust Attorneys. (Tr. 30-31.) The fact that this conversation was a part of the criminal investigation is of no moment due to the fact that this information was easily obtainable directly from the relator himself. Counsel for the relator indicated multiple times during the hearing that he was more than willing to provide to the government information such as the transcript of this conversation verifying his claim regarding the payments to Messrs. Hill and Kitchens. (*See* JML Hr'g Tr. 22.) Moreover, even if the relator were unable to provide the transcript of the conversation verifying this claim, the government very easily could have contacted the relator and asked him whether he had any contact with any of the individuals that might help corroborate his allegations, which would have had the same effect in uncovering the details of the conversation.

made a judgment call that the criminal investigation into the bid-rigging at issue was more important than the civil investigation. Having made this decision, they then proceeded to do nothing, except wait for the Antitrust Attorneys to be finished with their criminal investigation into the bid-rigging conspiracy. They made no attempts to build their case against the defendants either through cooperation with the parallel criminal investigation or through their own efforts. Instead, the Civil Attorneys made "an assumption" that *everything* obtained during the course of the criminal investigation–even by OIG investigators working on behalf of both the Civil and Antitrust Divisions–was as a result of a grand jury, and could therefore not be obtained in order to aid the civil investigation due to Rule 6(e) of the Federal Rules of Criminal Procedure.[23] (JML Hr'g Tr. 96-97.)

Still, plaintiffs offer two arguments in defense of their failure to exercise due diligence, and their argument that their actions were reasonable under the circumstances. First, plaintiffs argue that the due diligence requirement should effectively be read out of the "reasonably should have known" inquiry due to the co-existence of parallel investigations by the Criminal and Civil Divisions into defendants' activities. Therefore, plaintiffs assert that the only reasonable action for a government official in the Civil Division would be to "defer to the criminal investigation" in order to avoid "the risk of hurting a criminal investigation." (JML Hr'g Tr. 162.) Second, plaintiffs

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[23] The severity of the assumption made by Ms. Mark and the Civil Attorneys is exacerbated by the fact that Ms. Mark testified that she made this assumption without any knowledge of, or any attempt to ascertain, the standards governing the production of materials under Rule 6(e). (JML Hr'g Tr. 135-37.)

posit that much of what would have been sought was likely protected under Rule 6(e) of the Federal Rules of Criminal Procedure. (JML Hr'g Tr. 96-97.)

These arguments are flawed because they presume–incorrectly–that *all* information obtained in the criminal investigation was off limits to the civil investigation. As the Supreme Court's decision in *Sells Engineering* and its progeny[24] point out, however, there are procedural methods that DOJ attorneys in the Criminal and Civil Divisions can utilize in order to ensure cooperation between the two investigations.[25] As these cases point out, Civil Division attorneys *can* seek criminal grand jury information and evidence if they can establish before a judge that "the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed . . . ." *John Doe*, 481 U. S. at 112 n.8 (citing *Douglas Oil Co. v. Northwest Petrol Stops Northwest*, 441 U.S. 211, 222-223 (1979)). Though *Sells Engineering* stated that Civil Division attorneys could not have unfettered access to these grand jury materials, the Court in *John Doe* stated that the standard for relinquishing that information is a "highly flexible one, adaptable to different circumstances and sensitive to the fact

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[24] 463 U.S. 418 (1983); *see also U.S. v. John Doe, Inc. I*, 481 U.S. 102 (1987).

[25] Indeed, as Chief Justice Burger noted in his dissent in *Sells Engineering*, "the civil provisions of the False Claims Act . . . were enacted as part of an integrated scheme of civil and criminal law enforcement." *Sells Engineering*, 463 U.S. at 472 (Burger, C.J. dissenting) (citing *United States v. Bornstein*, 423 U.S. 303, 305-07 n.1 (1976).

that the requirements of secrecy are greater in some situations than in others." *John Doe*, 481 U.S. at 112.

Moreover, these arguments are based on the flawed premise that, under the FCA, when parallel civil and criminal investigations into the same conduct are underway, one investigation–invariably the civil investigation–must take a backseat to the other investigation. In the context of limitations periods, such an interpretation would create a situation where the existence of a criminal investigation could delay indefinitely the running of the civil limitation period under the FCA. Such a result would run counter to the very purpose of statutes of limitation, which calls for the "the *prompt* presentation of claims." *Kubrick*, 444 U. S. at 117 (emphasis added). Admittedly, some statutes, such as the Clayton Act, do specifically allow for an ongoing civil or criminal proceeding brought by the government to toll the statute of limitations in certain instances.[26] There is, however, no such express provision in the FCA that would allow the statute of limitations to be suspended in a civil case during the pendency of a criminal investigation into the fraudulent conduct. *See* 31 U.S.C. § 3731(b). The Court will not read such a dramatic provision into the FCA. As written, the statutes of limitation provisions under the FCA contemplate cooperation between attorneys conducting parallel criminal and civil investigations into like

[26] *See* 15 U.S.C. § 16(i) ("Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . .").

conduct so that each case–civil and criminal–can be brought against the defendants within the appropriate limitations period.

In sum, even if all of the information and testimony uncovered during the course of the criminal investigation was protected by Rule 6(e),[27] there exists a working procedure whereby attorneys in the Civil Division at DOJ can seek to obtain information from an ongoing parallel criminal investigation. Moreover, even if the strictures under Rule 6(e) appear to prevent the Civil Attorneys from obtaining the information from the attorneys conducting the criminal investigation, there is nothing in the rule that appears to prevent the Civil Attorneys from seeking out this information on their own from the same witnesses used in the criminal investigation.[28] In-

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[27] This Court does not–and, indeed, need not–address whether a portion or all of the information unearthed during the course of the criminal investigation is protected under Rule 6(e) because this goes to the issue of *what* type of information would be found by exercising due diligence. As the D.C. Circuit has found, however, courts only reach the merits of *what* an exercise of due diligence would have uncovered if the plaintiff exercises due diligence in the first place. *Cf. Richards* 662 F.2d at 71 (finding that the defendant's burden of presenting facts showing that the plaintiff could have discovered the fraud arises only "when tolling is proper," and noting that tolling is proper "*unless* the facts show that the plaintiff failed to exercise due diligence in discovering the material facts underlying his cause of action"). In light of the Civil Attorneys' failure to exercise due diligence, the Court need not expand its inquiry into the merits of what the Civil Attorneys might or might not have uncovered as a result of following the Rule 6(e) procedures to obtain information from the parallel criminal investigation into the bid-rigging conspiracy at issue in this case.

[28] *See* Fed. R. Crim. P. 6(e)(2). Though Rule 6(e)(2) extends the obligation of keeping matters occurring before a grand jury

deed, the FCA's own provisions demand that the Civil Attorneys make efforts in earnest to obtain the information so that the action may be filed within the limitations period, even in the face of an ongoing criminal investigation. *See* 31 U.S.C. § 3731(b).

Accordingly, this Court finds that a reasonable Civil Division attorney *would* have–and *should have*–sought information from the criminal investigation being conducted by the Antitrust Division. At the very least, the Civil Attorneys should have taken steps on their own to investigate the conduct at issue. The failure by the Civil Division attorneys in this case to take these steps, all the while blindly and incorrectly assuming that there would be no fruit to bear from these efforts, was unreasonable under the circumstances. Therefore, the Court finds that no reasonable jury could find that the government exercised proper due diligence under the circumstances of this case.

As the Supreme Court has stated, a party who fails to act diligently to preserve his or her claim within the applicable limitations period cannot later invoke equitable principles to toll the statutory period. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). It stands to reason, then, that a party who fails to act diligently to preserve his or her claim cannot hope to toll the running of a limitations period that is rooted in the principles of equity, such as Section 3731(b)(2).

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to grand jurors, interpreters, court reporters, operators of recording devices, persons who transcribe recorded testimony, attorneys for the government, or persons to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii), it does not extend the same obligation to witnesses who provide the information to the grand jury. *See id.*

III. APPLICATION OF LEGAL STANDARD TO FACTS OF THE PRESENT CASE

A. Validity of Claims Under Three-Year Provision Under Section 3731(b)(2)

No evidence of fraudulent concealment of the injury having been shown by the plaintiffs, the three-year statute of limitations under § 3731(b)(2) began to run the moment the government was on inquiry notice of the conspiracy to violate the False Claims Act. Based upon the evidence proffered by defendants, no reasonable jury could dispute the fact that the government was on inquiry notice of the injury when it was in possession of the relator's Complaint and Disclosure Statement with both sets of attachments on August 4, 1995. Therefore, this Court finds that the three-year limitations period began to run from that date. Neither the government nor the relator filed their respective complaints against defendants Harbert and Anderson within three years of August 4, 1995.

Therefore, applying the three-year limitations period under § 3731(b)(2), the relator's initial complaint against defendants Anderson and Harbert are time-barred. The government's complaint against defendant Anderson[29] is similarly untimely under the three-year limitations period.

B. Validity of Claims Under Six-Year Provision Under Section 3731(b)(1)

This resolution does not, however, end the Court's inquiry. As § 3731(b) clearly states, plaintiffs receive the benefit of a statute of limitations beginning

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[29] The government did not file a complaint against defendant Harbert.

either: (1) six years from the date of the False Claims Act violation; or (2) three-years from the date the government knew or should have known of the False Claims Act violation, whichever period is longer. See 31 U.S.C. § 3731(b). Accordingly, this Court must determine whether a reasonable juror could conclude that any claims survive for either plaintiff against the defendants under the six-year limitations period. The six-year statute of limitations under § 3731(b)(1) begins on the date six years prior to the date the complaint was filed, and ends at the filing of the relator's complaint. *See Fisher*, 180 F. Supp. at 195.[30] Accordingly, the relator may use any overt acts that occur within that time frame to prove the underlying conspiratorial agreement, but may not use overt acts occurring *prior to the date the statute of limitations began to run. See id.*

Therefore, any claim brought by either plaintiff against the defendants that was submitted within six-years of the filing date of each plaintiff's complaint[31] will be deemed timely. The government's

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[30] As this Court has already held, the complaints brought against defendants Harbert and Anderson may not relate back to the date the relator's original complaint was filed because neither defendant was an intended-but-mistakenly omitted defendant under Rule 15(c)(3) who might later be added and benefit from the relation back doctrine. *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, No: 95-1231, 2007 WL 842082, at *2 (D.D.C. Mar. 19, 2007) (Lamberth, J.); *see also* Fed. R. Civ. P. 15(c)(3). Therefore, the relevant filing dates for statute of limitations purposes are those of the relator's Second Amended Complaint and the government's Complaint in Intervention, in which defendants Harbert and Anderson are first mentioned as defendants. Relator's Second Amended Complaint was filed on December 28, 2000, while the government's Complaint in Intervention was filed March 13, 2001.

[31] *See supra* note 4.

Complaint in Intervention was filed on March 13, 2001, and included claims on all three contracts at issue in this case: contracts 20A, 29, and 07. Therefore, the Court finds that any claim on any contract submitted on or after March 13, 1995 is timely under the six-year limitations period. The claims for contract 20A were submitted October 3, 1989 and June 20, 1993. The claims for contract 07 were submitted between September 5, 1991 and January 18, 1995. The claims for contract 29 were submitted between July 10, 1990 and September 19, 1996. Therefore, applying the six-year limitations period, the only claims brought by the government against defendant Anderson that are timely are those claims on contract 29 that were submitted on or after March 13, 1995.

By contrast, relator's Second Amended Complaint was filed on December 28, 2000, and included only claims on contract 20A. Applying the six-year limitations period under § 3731(b)(1) of the FCA to the December 28, 2000 filing date, the plaintiffs would be able to bring claims on contracts that occurred on or after December 28, 1994. The claims for contract 20A allegedly were submitted October 3, 1989 and June 20, 1993. The last claim for payment on contract 20A was allegedly submitted on June 20, 1993, more than a year and a half outside of the limitations period. Therefore, under the six-year limitations period, the claims against defendants Harbert and Anderson as to the remaining two contracts must also be dismissed because they were brought in the relator's third amended complaint, which was filed on March 9, 2006.[32]

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[32] As this Court has previously found, an amended complaint may not relate back to an untimely original complaint. *See United States ex rel. Miller v. Holzmann*, No. 95-1231, 2007

IV. CONCLUSION

For the foregoing reasons, it is clear the government reasonably should have known "facts material to the right of action" as to defendants Harbert and Anderson prior to December 28, 1997, and that no reasonable jury could find otherwise. Accordingly, all of the relator's claims on all contracts against defendant Harbert are untimely under the limitations periods prescribed by the FCA were dismissed. Similarly, all of the relator's claims on all contracts against defendant Anderson, and all of the government's claims but one claim on contract 29 against defendant Anderson were dismissed as untimely under the FCA's statute of limitations.

In reaching this decision, the Court notes that it is a lamentable consequence that the relator's ability to take advantage of the three-year alternate limitations period under § 3731(b)(2) has been hamstrung in this case by the government's failure to exercise due diligence in investigating the civil claims against the defendants. The relator may think it inequitable to punish one party's ability to bring a claim based upon the actions–or, in this case, patent inaction–of another party. Such an argument, however, fails to recognize the obvious effect that the twelve year tenure of this case had on the presentation of the claims against the defendants. Indeed, the very things that statutes of limitations are designed to prevent–loss of evidence, fading memories, disappearance of documents–were undeniably present in

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U.S. Dist. LEXIS 15596, at *20 n.13. (D.D.C. Mar. 7, 2007) (Lamberth, J.) (citing *Henderson v. Bolanda*, 253 F.3d 928, 931 (7th Cir. 2001); *Papenthien v. Papenthien*, 16 F. Supp. 2d 1235, 1241 (S.D. Cal. 1998)).

this case. Allowing the relator in this case to bring claims outside of the limitations period notwithstanding the government's unreasonable inaction under the circumstances would fashion a remedy that would run counter to the very purpose of statutes of limitations in general.[33] The Court is not free to construe statutes of limitation in that manner. *See Kubrick*, 444 U.S. at 117.

Finally, as the Supreme Court has stated, "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). Along these lines, the Court hopes that the relator's case will serve as an example that will encourage greater cooperation between attorneys conducting parallel criminal and civil investigations into similar fraudulent conduct, and will encourage relators to be more vigilant in their pursuit of *qui tam* claims under the FCA. More importantly, the Court hopes that this case will remind all parties of the importance of statutes of limitations, and the concrete consequences that come when parties fail to exercise diligence in heeding them.

Signed by Royce C. Lamberth, United States District Judge, June 14, 2007.

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[33] *See supra* Section II.B.1.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5390
1:95-cv-01231-RCL

UNITED STATES OF AMERICA, EX REL. RICHARD F. MILLER AND RICHARD F. MILLER,
Appellees

v.

BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., *et al.*,
Appellees

September Term 2010
Filed On: October 1, 2010

Consolidated with 08-5391, 08-5392, 08-5393, 08-5394

BEFORE: Sentelle, Chief Judge, and Ginsburg and Tatel,* Circuit Judges

ORDER

Upon consideration of appellees' joint petition for panel rehearing filed on August 6, 2010, the response thereto, and the motion for leave to file a reply, and the lodged reply, it is

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* Circuit Judge Tatel would grant the petition for panel rehearing.

ORDERED that the motion be denied. The Clerk is directed to note the docket accordingly. It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX E

PUBLIC LAW 111-21—MAY 20, 2009
123 STAT. 1617

Public Law 111-21
111th Congress

An Act

To improve enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to Federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

SEC. 4. CLARIFICATIONS TO THE FALSE CLAIMS ACT TO REFLECT THE ORIGINAL INTENT OF THE LAW.

(a) CLARIFICATION OF THE FALSE CLAIMS ACT.—Section 3729 of title 31, United States Code, is amended—

(1) by striking subsection (a) and inserting the following:

"(a) LIABILITY FOR CERTAIN ACTS.—

"(1) IN GENERAL.—Subject to paragraph (2), any person who—

"(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

"(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

"(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

"(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

"(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

"(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

"(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount

of damages which the Government sustains because of the act of that person.

"(2) REDUCED DAMAGES.—If the court finds that—

"(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

"(B) such person fully cooperated with any Government investigation of such violation; and

"(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

"(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.";

(2) by striking subsections (b) and (c) and inserting the following:

"(b) DEFINITIONS.—For purposes of this section—

"(1) the terms 'knowing' and 'knowingly'—

"(A) mean that a person, with respect to information—

"(i) has actual knowledge of the information;

"(ii) acts in deliberate ignorance of the truth or falsity of the information; or

"(iii) acts in reckless disregard of the truth or falsity of the information; and

"(B) require no proof of specific intent to defraud;

"(2) the term 'claim'—

"(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

"(i) is presented to an officer, employee, or agent of the United States; or

"(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

"(I) provides or has provided any portion of the money or property requested or demanded; or

"(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

"(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

"(3) the term 'obligation' means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

"(4) the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.";

(3) by redesignating subsections (d) and (e) as subsections (c) and (d), respectively; and

(4) in subsection (c), as redesignated, by striking "subparagraphs (A) through (C) of subsection (a)" and inserting "subsection (a)(2)".

(b) INTERVENTION BY THE GOVERNMENT.—Section 3731(b) of title 31, United States Code, is amended—

(1) by redesignating subsection (c) as subsection (d);

(2) by redesignating subsection (d) as subsection (e); and

(3) by inserting the new subsection (c):

"(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has

brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.".

(c) CIVIL INVESTIGATIVE DEMANDS.—Section 3733 of title 31, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A)—

(I) by inserting ", or a designee (for purposes of this section)," after "Whenever the Attorney General"; and

(II) by striking "the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law," and inserting "the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b),"; and

(ii) in the matter following subparagraph (D)—

(I) by striking "may not delegate" and inserting "may delegate"; and

(II) by adding at the end the following: "Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation."; and

(B) in paragraph (2)(G), by striking the second sentence;

(2) in subsection (i)(2)—

(A) in subparagraph (B), by striking ", who is authorized for such use under regulations which the Attorney General shall issue"; and

(B) in subparagraph (C), by striking "Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities."; and

(3) in subsection (l)—

(A) in paragraph (6), by striking "and" after the semi-colon;

(B) in paragraph (7), by striking the period and inserting "; and"; and

(C) by adding at the end the following:

"(8) the term 'official use' means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of

Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.".

(d) RELIEF FROM RETALIATORY ACTIONS.—Section 3730(h) of title 31, United States Code, is amended to read as follows:

"(h) RELIEF FROM RETALIATORY ACTIONS.—

"(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

"(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would

have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.".

(e) FALSE CLAIMS JURISDICTION.—Section 3732 of title 31, United States Code, is amended by adding at the end the following new subsection:

"(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.".

(f) EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that—

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

* * * *

No. 10-864

In the Supreme Court of the United States

BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In May 2009, Congress amended the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.* See Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617. As relevant here, Congress added a new provision, 31 U.S.C. 3731(c) (Supp. III 2009), which states that "[i]f the Government elects to intervene" and "file its own complaint" in a *qui tam* action, "any such Government pleading shall relate back to the filing date" of the relator's complaint under certain circumstances. Congress further provided that the FCA's new relation-back provision "shall apply to cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625. Because this *qui tam* action was pending before the court of appeals at the time of the 2009 amendments, the court applied the relation-back provision and determined that some (but not all) of the government's claims were timely. The court rejected petitioners' argument that the relation-back provision applies only to cases in which the government intervened after May 2009. The question presented is as follows:

Whether the court of appeals correctly held that the relation-back provision applies to the government's complaint in intervention in this suit.

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In the Supreme Court of the United States

No. 10-864

BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-83a) is reported at 608 F.3d 871. The opinion of the district court (Pet. App. 84a-236a) is reported at 505 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2010. A petition for rehearing was denied on October 1, 2010 (Pet. App. 272a-273a). The petition for a writ of certiorari was filed on December 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Attorney General may bring a civil action if he finds that a person has committed a violation. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring his own suit (commonly referred to as a *qui tam* action) "for the person and for the United States Government." 31 U.S.C. 3730(b)(1); see *United States ex rel. Eisenstein* v. *City of N.Y.*, 129 S. Ct. 2230, 2232 (2009). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d)(1).

If a relator brings a *qui tam* action, the complaint is initially filed under seal and served upon the government, together with "substantially all material evidence and information the [relator] possesses." 31 U.S.C. 3730(b)(2). "The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information," *ibid.*, and the district court may extend the 60-day period upon a showing of good cause, 31 U.S.C. 3730(b)(3). If the government declines to intervene, the relator "shall have the right to conduct the action," but the district court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3).

b. This case concerns the FCA's statute of limitations. A civil action under the FCA may not be brought

> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. 3731(b)(1) and (2).

In May 2009, while this lawsuit was pending before the court of appeals, Congress amended the FCA. See Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617. As relevant here, Congress specified that, for statute-of-limitations purposes, claims brought by the government in a *qui tam* action may relate back to earlier claims brought by the relator based on the same conduct or events. Congress provided that

> [i]f the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the com-

> plain . of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

31 U.S.C. 3731(c) (Supp. III 2009); see Pet. App. 278a-279a. Congress further provided that the new Section 3731(c) "shall apply to cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625.

2. Following the 1978 Camp David Accords, the United States agreed to provide economic assistance to Egypt, including funding to improve the sewer systems in Cairo and Alexandria, through the United States Agency for International Development (USAID). The sewer projects were divided into numerous construction contracts and put out for bidding by contractors prequalified by the USAID. Pet. App. 3a.

In 1995, Richard Miller filed a *qui tam* complaint under the FCA. At the time, Miller was a Vice President of the J.A. Jones Construction Company (Jones), which had partnered with Harbert International, Inc. (HII) in a series of identical joint ventures that had bid on three of the sewer projects. Miller alleged that, in the course of his employment, he had discovered that Jones, HII, and several related corporations had conspired to rig the bidding on the sewer projects in the late 1980s and the 1990s. Miller's complaint focused on one particular contract, Contract 20A, but it alleged that the defendants had conspired to rig the bidding on other contracts as well. Pet. App. 4a-5a, 9a.

As required by the FCA, Miller filed his complaint under seal. Shortly after Miller filed his complaint, the government opened a criminal investigation into the

conspiracy, and it then filed successive motions in this case to keep Miller's complaint sealed in order to prevent interference with the ongoing investigation. The government ultimately prosecuted many of the participants in the Cairo and Alexandria bid-rigging arrangements, obtaining convictions of at least five United States corporations or individuals, including one of the defendants in this case (Roy Anderson). Pet. App. 4a-5a.

In 2001, Miller's complaint was unsealed and the government filed its own complaint in intervention, taking over control of the case. The government alleged that numerous defendants, including petitioners, had participated in the Cairo and Alexandria bid-rigging schemes. The government's complaint adopted Miller's claims with respect to Contract 20A, but it also added claims with respect to Contracts 07 and 29, which the government characterized as part of the same conspiracy. Miller then amended his complaint to add claims related to Contracts 07 and 29. After six years of pleadings, motions, and discovery, trial began in March 2007. Following seven weeks of testimony, the jury found for Miller and the government on every count. Pet. App. 5a-8a.

The jury further found that the United States had suffered approximately $34 million in damages from petitioners' conduct. As required by the FCA, the district court trebled those damages and added statutory penalties. See 31 U.S.C. 3729(a). After subtracting amounts previously recovered by the United States, the court awarded $90.4 million in damages. Petitioners moved for judgment notwithstanding the jury's verdict on a variety of issues and sought a new trial on others. Rejecting petitioners' legal arguments and finding the

jury's verdict to be supported by the evidence, the district court denied all of petitioners' motions. Pet. App. 8a; see *id.* at 84a-236a (district court opinion). *Inter alia*, the district court held, approximately 11 months before the 2009 FCA amendments were enacted, that the government's complaint in intervention was timely because it related back to Miller's sealed complaint pursuant to Federal Rule of Civil Procedure 15(c)(1) and (2). See *id.* at 219a n.137.

3. The court of appeals affirmed in part and vacated and remanded for a new trial in part. Pet. App. 1a-83a.

a. The court of appeals first held that both Miller's and the government's claims concerning Contract 20A were timely. Pet. App. 9a-14a. The court recognized that the FCA's statute of limitations precludes a civil action filed "more than 6 years after the date on which the violation * * * [was] committed." 31 U.S.C. 3731(b)(1). The court reasoned that the claims concerning Contract 20A in Miller's original complaint were timely because that complaint was filed in 1995, less than six years after the alleged Contract 20A violations. Pet. App. 9a.

The court of appeals also concluded that the government's claims concerning Contract 20A were timely because those claims "relate[d] back to Miller's timely filed complaint." Pet. App. 10a. The court explained that "[a]t the time of trial the FCA did not by its terms address relation back," but "[i]n 2009, after trial but before this appeal was briefed, the Congress amended the FCA expressly to provide for relation back." *Ibid.* As amended, the FCA provides that

> [f]or statute of limitations purposes, [a] Government pleading shall relate back to the filing date of the

> complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

Id. at 11a (quoting 31 U.S.C. 3731(c) (Supp. III 2009)). Because petitioners did not argue that "the scope of the Government's claims concerning Contract 20A impermissibly expands beyond that of Miller's," the court held that "the Government's claims concerning Contract 20A are not barred by the statute of limitations because they relate back to Miller's original timely complaint." *Id.* at 13a-14a.

The court of appeals rejected petitioners' argument that the relation-back provision does not apply to this case. The court observed that "[a]lthough most of the 2009 amendments to the FCA apply only 'to *conduct* on or after the date of enactment,' the provision permitting relation back was made expressly 'appl[icable] to cases pending on the date of enactment.'" Pet. App. 11a (quoting FERA § 4(f)(2), 123 Stat. 1625) (brackets in original). Petitioners argued "that Congress intended to limit the effect of the statute to cases in which the Government ha[d] not yet intervened" when the 2009 amendments were enacted. *Id.* at 12a. The court of appeals rejected that contention, explaining that "the effective date of the provision concerning relation back is not limited in scope to a particular type of case or subset of cases." *Ibid.*; see *ibid.* ("We have no need to draw inferences * * * when the statute is clear on its face.").

The court of appeals also found "unpersuasive" petitioners' arguments "that the amended statute cannot constitutionally be applied to this case." Pet. App. 11a.

The court explained that "[t]he *Ex Post Facto* Clause of the Constitution applies only to penal legislation," *ibid.* (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798)), and that "[t]he FCA is not penal," *ibid.* (citing *Hudson* v. *United States*, 522 U.S. 93, 100-103 (1997)). The court declined to address petitioners' "arguments concerning the Takings and the Due Process Clauses of the Constitution because they were raised in only two conclusory sentences." *Ibid.*

b. The court of appeals agreed with petitioners, however, that the government's and Miller's claims concerning Contracts 07 and 29 were not timely. Pet. App. 14a-19a. The court concluded that the government's claims could not relate back to Miller's original complaint because "the Government's claims concerning Contracts 07 and 29 * * * have little to do with Miller's claims concerning Contract 20A." *Id.* at 14a; see *id.* at 17a ("[A]ll three contracts are similar only in that each was funded by the USAID and required work related to sewer systems in Egypt."). The court held that Miller's claims regarding Contracts 07 and 29 were time-barred "because he added them after the limitation period had run" and "Miller may not take advantage of the relation back provision in the FCA, which applies only to the Government's pleadings." *Id.* at 19a.

c. The court of appeals further held that petitioners had been unfairly prejudiced by the government's use of evidence and argument that contradicted a pretrial stipulation, see Pet. App. 31a-34a, and other evidence and argument commenting upon petitioners' wealth, see *id.* at 37a, 49a-53a. Based on that holding, the court vacated the district court's judgments and remanded for a new trial. *Id.* at 34a, 53a.

d. Judge Tatel dissented in part. Pet. App. 72a-83a. He agreed with the panel majority that Miller's and the government's claims on Contract 20A were timely. He would have held, however, that the government's claims on Contracts 07 and 29 were also timely because they arose from the same overarching conspiracy and therefore related back to Miller's original complaint. *Id.* at 72a-79a. Judge Tatel also would have held that the district court did not abuse its discretion in declining to grant a new trial. See *id.* at 79a-82a.

ARGUMENT

In May 2009, Congress amended the FCA to provide that "[i]f the Government elects to intervene" and "file its own complaint" in a *qui tam* action, "any such Government pleading shall relate back to the filing date" of the relator's complaint under certain circumstances. FERA § 4(b)(3), 123 Stat. 1623. Congress expressly provided that the FCA's new relation-back provision "shall apply to cases pending on the date of enactment." § 4(f)(2), 123 Stat. 1625. Properly understood, that provision did not change the applicable law, but simply confirmed the rule adopted by the majority of lower courts before the 2009 amendments were enacted.

Because this *qui tam* action was pending at the time of the 2009 amendments, the court of appeals applied the relation-back provision to determine the timeliness of the government's claims. The court therefore rejected petitioners' argument that the relation-back provision applies only to cases in which the government intervenes after May 2009. The decision below is correct and does not conflict with any decision of this Court

or of any other court of appeals. Further review is not warranted.

1. a. As a threshold matter, it is not clear how petitioners have been harmed by the court of appeals' decision to apply the relation-back provision, 31 U.S.C. 3731(c), to this case. The government and relator Miller brought claims concerning three contracts: Contracts 07, 20A, and 29. The court of appeals agreed with petitioners that, even under Section 3731(c), the government's and Miller's claims concerning Contracts 07 and 29 are time-barred. Pet. App. 14a-19a; see Pet. 7 n.1 ("The Court of Appeals held, however, that the claims as to 07 and 29 did not relate back, even under FERA."). Accordingly, the only claims that remain at issue are those by the government and Miller concerning Contract 20A.

The court of appeals held that the government's claims on Contract 20A are timely because they relate back to Miller's original complaint under Section 3731(c). That ruling, however, is of little or no practical consequence in this case because the court also held—and petitioners do not dispute—that Miller's claims concerning Contract 20A are timely without the benefit of Section 3731(c). Pet. App. 10a. Moreover, petitioners did not argue that "the scope of the Government's claims concerning Contract 20A impermissibly expands beyond that of Miller's." *Id.* at 13a. As a result, it does not matter whether the government's claims on Contract 20A are timely under Section 3731(c). Miller's claims on Contract 20A will proceed to trial on remand without regard to Section 3731(c), and the government's claims

on Contract 20A, whether or not timely, are substantially the same as Miller's indisputably timely claims.[1]

b. Even if the court of appeals' application of Section 3731(c) could be expected tangibly to affect the conduct of the proceedings on remand, the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (noting that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 n.63 (9th ed. 2007).

As petitioners acknowledge, the court of appeals "granted [them] new trials as to [Contract] 20A based on evidentiary errors." Pet. 7 n.1; see Pet. App. 31a-34a, 37a, 49a-53a; p. 8, *supra*. If petitioners prevail on remand, further consideration of their current claims will be unnecessary. If petitioners are again found liable and the judgment against them is affirmed on appeal,

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[1] The government's complaint in intervention, unlike relator's complaint, raised common law claims in addition to its FCA claim. Petitioners do not address those common law claims. See, *e.g.*, Pet. 8 ("[T]his case squarely presents the question whether the Constitution allows Congress to resuscitate the government's time-barred *FCA claims*.") (emphasis added). Specifically, petitioners do not argue that the government's common law claims impermissibly expand the scope of Miller's claims on Contract 20A. In any event, the government's common law claims arise from the same wrongful conduct by petitioners, and thus their litigation will not tangibly affect the proceedings on remand.

they can raise those claims, together with any additional issues that might arise upon retrial, in a new petition for certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). Review by this Court at the present stage of the litigation therefore would be premature.

2. The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals.

a. Section 3731(c) provides that "[i]f the Government elects to intervene" and "file its own complaint" in a *qui tam* action, "any such Government pleading shall relate back to the filing date" of the relator's complaint, to the extent that the government's claims arise from the same conduct or events as the relator's claims. Section 3731(c) thus ensures that when the government elects to assume control of a *qui tam* action, the government can file timely pleadings that relate back to the relator's original complaint. Under Federal Rule of Civil Procedure 15, a relator can file an amended complaint "assert[ing] a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Section 3731(c) ensures that when the government steps into a relator's shoes, it has the same power to make amendments "aris[ing] out of the conduct, transactions, or occurrences set forth, or attempted to be set forth," in the prior complaint of [the relator]." 31 U.S.C. 3731(c) (Supp. III 2009).

Nothing in Section 3731(c) itself imposes temporal limits on the range of *qui tam* actions to which the provision applies. Section 3731(c) states that "[i]f the Government elects to intervene and proceed" with a *qui tam* action, "the Government may file its own complaint or amend the complaint of [the relator]." Congress recognized that the government may wish to file its own pleadings in order "to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief." 31 U.S.C. 3731(c) (Supp. III 2009). Congress therefore specified that when the government files its own pleadings in a *qui tam* action in which it has intervened, "*any such Government pleading shall relate back* to the filing date" of the relator's complaint, provided that the government's claims arise out of the same conduct or events as the relator's complaint. *Ibid.* (emphasis added).

Although Section 3731(c) itself does not specify the range of suits to which it applies, a different provision of the 2009 amendments squarely resolves that question, stating without qualification that Section 3731(c) "shall apply to cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625. Congress thus unambiguously declined to limit Section 3731(c)'s application in the manner that petitioners advocate. Because this case was "pending on the date of enactment" of Section 3731(c), the court of appeals correctly applied that provision to determine the timeliness of the government's claims in this *qui tam* action. See, *e.g.*, *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the

courts is to enforce it according to its terms.'") (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).

b. The decision below does not conflict with any decision of another court of appeals, and petitioners do not contend that such a conflict exists. Petitioners instead argue that district courts "addressing FERA's supposed retroactivity are coming to opposite conclusions." Pet. 19. Petitioners rely, however, on district court decisions concerning a different 2009 amendment with different language. As petitioners acknowledge, that other amendment to Section 3729(a)(1) is "not directly implicated here." *Ibid.* With respect to the amendment to Section 3731(c) that is at issue in this case, petitioners do not identify any division of authority even among district courts.

c. The question presented concerns the applicability of Section 3731(c) to FCA *qui tam* suits in which the government intervened before May 2009, when the relevant FCA amendments became law. That question by its nature will diminish in importance with the passage of time.

d. Even if Section 3731(c) did not apply to this case, the court of appeals would still have been correct to hold that the government's complaint with respect to Contract 20A related back to the date the relator's complaint was filed. Properly understood, Section 3731(c) did not change the law governing relation back in FCA *qui tam* suits, but simply confirmed what had previously been the majority view among the lower courts—*i.e.*, that when the government "elect[s] to intervene and proceed with" a pending *qui tam* action, 31 U.S.C. 3730(b)(2), the government effectively stands in the relator's shoes, and its complaint should therefore relate

back to a timely relator's complaint. Indeed, before the 2009 amendments were enacted, the district court held in this case that the government's claims concerning Contract 20A could relate back to Miller's original complaint under Federal Rule of Civil Procedure 15. Pet. App. 10a, 219a n.137; see p. 6, *supra*. Even if Section 3731(c) did not apply to this case, the FCA's statute of limitations would bar the government's complaint with respect to Contract 20A only if that district court holding were overturned.

3. a. Petitioners' various arguments for a different interpretation of the statute lack merit. Petitioners contend that Section 3731 permits relation-back only in "*qui tam* actions that [had] been filed under seal but as to which the government had not yet decided to intervene in May 2009." Pet. 29. Petitioners derive that limitation from the first sentence of Section 3731(c), which states that "[i]f the Government elects to intervene and proceed with [a *qui tam* action], the Government may file its own complaint or amend the complaint of [the relator]." Petitioners argue (Pet. 29-30) that, by using the present tense "elects" and "may file," Congress expressed its intent to permit relation-back only in cases in which the government had not yet intervened at the time of the 2009 amendments.

That is not a plausible reading of the statutory text. The first sentence of Section 3731(c) simply restates authority that the government possessed before Section 3731(c)'s enactment. Under other provisions of the FCA, it has long been the case that "[t]he Government may elect to intervene and proceed" with a relator's *qui tam* action. 31 U.S.C. 3730(b)(2); see 31 U.S.C. 3730(b)(3). The first sentence of Section 3731(c) recognizes that longstanding practice in *qui tam* actions by

stating that "[i]f the Government elects to intervene and proceed * * *, the Government may file its own complaint or amend the [relator's] complaint." That is what the government did here; it filed its own complaint when it intervened in 2001. Pet. App. 5a. The first sentence of Section 3731(c) thus defines the set of pleadings to which the provision applies: complaints filed by the government in *qui tam* actions in which it has intervened.

The second sentence of Section 3731(c) then clarifies that "[f]or statute of limitations purposes, any such Government pleading shall relate back to the filing date" of the relator's complaint under certain circumstances. When Section 3731(c) requires relation-back for "any such Government pleading," it is referring to the set of pleadings described in the previous sentence: complaints filed by the government in *qui tam* actions in which it has intervened. On its face, Section 3731(c) does not limit relation-back to government pleadings filed in cases in which the government has intervened after May 2009. And, as explained above, Congress defined the temporal scope of Section 3731(c)'s coverage in a separate provision, which makes Section 3731 applicable to all "cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625.[2]

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[2] Petitioners' reliance (Pet. 30) on the canon of constitutional avoidance is misplaced. That canon is "a tool for choosing between competing *plausible* interpretations" of a statute, *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) (emphasis added), and petitioners' interpretation is not plausible for the reasons set forth in the text. In any event, the canon applies only when a competing plausible interpretation of a statute raises "serious constitutional doubts." *Ibid.* As explained below, the court of appeals' interpretation of the statute does not raise any constitutional doubts, let alone any serious ones. See pp. 17-19, *infra*.

b. Petitioners also contend (Pet. 25-28) that application of Section 3731(c) to this case runs afoul of the presumption that federal statutes do not apply retroactively. That argument ignores Congress's clear and express directive that Section 3731(c) applies to all suits that were pending when the provision was enacted. "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994). Here, Congress "expressly prescribed the statute's proper reach" by providing that the amended Section 3731(c) "shall apply to cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625. There is consequently no need for guesswork about what Congress intended or "resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

In any event, Section 3731(c) is not properly viewed as retroactive legislation because it does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Petitioners' submission of false claims to the government was unlawful both before and after the 2009 amendments, and their potential civil liability for that past conduct has not been increased. The only question is whether, in a timely *qui tam* action based on those false claims, the government may intervene and file a new complaint that relates back to the relator's original complaint for statute of limitations purposes. And even with respect to that question, Section 3731(c) did not *change* the applicable law, but sim-

ply *confirmed* that the government's complaint in an FCA *qui tam* case relates back to the relator's timely-filed complaint.

c. Even if Section 3731(c) were viewed as retroactive, petitioners would be wrong in contending (Pet. 9-18) that the statute is unconstitutional as applied in this case. To the extent that petitioners rely (Pet. 10) on the Due Process and Just Compensation Clauses, the court of appeals declined to address those arguments "because they were raised in only two conclusory sentences." Pet. App. 11a. This Court does not ordinarily consider questions not passed upon by the court below, see *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks omitted); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998), and there is no reason to depart from that ordinary practice here, in light of petitioners' failure to adequately press their arguments before the court of appeals.

To the extent that petitioners rely on the Ex Post Facto Clause, their challenge lacks merit because that Clause applies only to criminal or penal provisions. See *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) ("[I]t has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them."); see also *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 533 (1998) (plurality opinion) ("In *Calder* v. *Bull*, this Court held that the *Ex Post Facto* Clause is directed at the retroactivity of penal legislation.") (citation omitted). Petitioners do not dispute that the Ex Post Facto Clause applies only to penal provisions, but they

argue that the FCA's "statutory scheme is 'so punitive either in purpose or effect as to negate'" any implication that the FCA is a civil statute. Pet. 12 (quoting *Smith* v. *Doe*, 538 U.S. 84, 92 (2003)).

The court of appeals correctly rejected that argument. Pet. App. 11a. This Court held in *Hudson* v. *United States*, 522 U.S. 93 (1997), that a system of monetary sanctions similar to the FCA was civil rather than punitive in nature. *Id.* at 103-105. Since *Hudson*, the two courts of appeals to consider the issue have held that the FCA is a civil rather than a criminal statute. See Pet. App. 11a; see also *United States* v. *Rogan*, 517 F.3d 449, 453-454 (7th Cir. 2008). Those decisions accord with the text of the FCA, which repeatedly refers to an action brought to enforce its provisions as a "civil action." 31 U.S.C. 3730(a), 3730(b), 3731(b); cf. *Eisenstein*, 129 S. Ct. at 2233, 2236-2237 (holding that, when the government does not intervene in an FCA *qui tam* suit, a notice of appeal must be filed within the 30-day period specified by Federal Rule of Appellate Procedure 4(a)(1)(A) for civil actions in which the government is not a party). Petitioners have not identified any evidence remotely resembling the kind of "clearest proof" that is "required to override legislative intent and conclude that an Act denominated civil is punitive" for purposes of the Ex Post Facto Clause. *Seling* v. *Young*, 531 U.S. 250, 262 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-864

IN THE

Supreme Court of the United States

BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., HARBERT INTERNATIONAL, INC., AND HARBERT CORPORATION,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

Although the Brief of the United States in Opposition ("Opposition") leaves several issues raised by Petitioners unaddressed, it advances some arguments that it contends militate against granting the Petition. Specifically, the government urges the Court to deny the Petition because (1) the question presented can be addressed (if it needs to be) after the new trial ordered by the Court of Appeals; (2) the retroactive application of the law does not affect very many litigants; (3) the retroactive application of the law is of no "practical" importance in any event because Petitioners will still face the relator's claims; and (4) regardless of whether retroactive application

of the law was appropriate, the Fraud Enforcement and Recovery Act of 2009 ("FERA") did not change the law, but merely clarified it. Petitioners address each of these points in this Reply.

I. If Petitioners Are Right That The Government's Claims Are Barred By The Statute Of Limitations, They Plainly Need Relief Now And Not Following A Second Trial In Which The Government Remains A Party.

The government argues that the Petition is somehow premature and that this Court can wait to consider the question (should it be inclined to do so) until after the second trial ordered by the Court of Appeals. The question now presented relates to Petitioners' conduct during the 1980s and early 1990s and the failure of the government to allow any notice of those claims until 2001. It is ironic that the government, which sat on its rights until the statute had run, now urges the Court to wait until after yet another trial (and, the government suggests, appeal) before reaching the issue that is clearly presented today.

In *United States v. Oregon Lumber Co.*, 260 U.S. 290, 301 (1922), this Court disapproved the idea "that one shall be twice vexed for one and the same cause." The Petitioners here have already had to endure a long and unquestionably vexing trial on claims made against them – a trial that took place in 2007. If Petitioners are correct that the government forfeited its right to bring claims in the case, it is no relief at all to require Petitioners to endure a second lengthy trial, with the government still participating as a party, before this Court considers whether all of the government's False Claims Act ("FCA") claims were time-barred. Indeed, the government's proposal to

further delay resolution of this issue is a prescription for a *third* trial. If the government does not belong in this case, this is the time to say so. *See United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945) ("The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case").

Moreover, even though the Court of Appeals "did not literally end the case" by remanding for a new trial, it did enter a judgment that will bind the trial court on remand. *Mills v. Alabama*, 384 U.S. 214, 217 (1966). Accordingly, this Petition does not present some pretrial interlocutory request for review on a partially developed record. Waiting until after the second trial to address the timeliness of the government's claims would be a "roundabout process" attended by "an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court" resulting "in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id.* at 217-18.

Finally, there is no doubt that this Court has jurisdiction to issue a writ of certiorari to review decisions of the Courts of Appeals before final rendition of judgment. 28 U.S.C. § 1254(1). And it has chosen to exercise that authority when appropriate. Indeed, this Court has not shied away from granting interlocutory review in FCA cases. *See, e.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (reviewing denial of motion to dismiss). Because review of the Court of Appeals' relation back ruling is so obviously fundamental to the further conduct of this case, the Court should

exercise its authority under 28 U.S.C. § 1254(1) and grant the Petition.

II. The Language Congress Employs In Amending A Statute To Deprive Persons Of Rights Retroactively Is An Important Question, No Matter How Many Litigants The Amendment Appears To Affect.

The government minimizes the significance of the FERA amendments, intimating that there is only a finite set of litigants that could be affected. Opposition at 14. But the significance of an issue is not measured solely by how many persons might confront an identical question. For instance, in *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987), the Court reviewed the adoption of a standard of proof for asylum applicants, notwithstanding the fact that a recent amendment to the pertinent statute raised the prospect that even the petitioner's status might be adjusted. The Court found the petition not moot, both because it was unclear whether the petitioner could secure all relief she sought through the new procedures and because the alternative means of securing relief would take longer. *Id.* at 426 n.3. Both concerns are present here as well.

Supreme Court Rule 10 identifies considerations that inform this Court's decision whether to grant certiorari, considerations that include, *inter alia*, whether an important question of federal law has not been (but should be) settled by the Court. Sup. Ct. R. 10(c). In recent years, this Court has addressed a number of cases that address Congressional amendments with putative retroactive impact. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (Title VII); *Hughes Aircraft Co. v. United States ex*

rel. Schumer, 520 U.S. 939 (1997) (FCA); *Lindh v. Murphy*, 521 U.S. 320 (1997) (AEDPA); *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (Coal Act); *Martin v. Hadix*, 527 U.S. 343 (1999) (PLRA); *INS v. St. Cyr*, 533 U.S. 289 (2001) (IIRIRA); *Carr v. United States*, --- U.S. ---, 130 S. Ct. 2229 (2010) (SORNA). Just as the principles in these cases are used to construe other statutes, the principles this Court sets forth here will reach beyond FERA.

Indeed, this case presents the next logical step in the sequence of the Court's decision-making: it offers the Court the opportunity to address the confusion among the Courts of Appeals and district courts as to whether the *Ex Post Facto* clause or another protection against retroactivity precludes Congressional action to resurrect claims already time-barred under punitive statutory schemes such as the FCA.[1]

This Court's recurring concern with the scope of Congress's power to apply new rules of law to past conduct has especial significance here in light of the purpose of statutes of limitations:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on

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[1] While it is true that much of the retroactivity debate triggered by FERA has concerned Congress's amendment in response to this Court's decision in *United States ex rel. Sanders v. Allison Engine Co.*, 553 U.S. 662 (2008), it is not true – as the government suggests – that the split in the circuits is confined to district courts. *See* Petition at 20, 23.

> notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

In this case, the relator's five-year delay before filing his Sealed Complaint, and the government's additional six-year delay in filing its Complaint in Intervention, resulted in "the very things that statutes of limitations are designed to prevent – loss of evidence, fading memories, [and] disappearance of documents." *United States ex rel. Miller v. Bill Harbert Int'l Const.*, 505 F. Supp. 2d 1, 19-20 (D.D.C. 2007) (App. 270a-271a). If the government's suggested construction were to be the law, the government could maintain a seal indefinitely, allowing the government exclusive control over when False Claims Act defendants receive initial notice that there are FCA claims against them. But the government's preferred construction cannot be squared with the fact that Congress did not remove the statute of limitations or its application to the government when it enacted FERA.[2]

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[2] The government suggests that Section 3731(c) cannot be characterized as retroactive legislation because it "does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" Opposition at 17. This conclusion would appear to have been foreclosed by *Stogner v. California*, 539 U.S. 607 (2003) and the cases discussed therein. As this Court explained, two of the characteristics of an *Ex Post Facto* law articulated in *Calder v. Bull*, 3 U.S. 386 (1798) – a law that aggravates a crime or makes it greater than it was when committed; and a law altering the legal rules or

III. The Ruling Of The Court Of Appeals Permitting The Government To Proceed With Its Contract 20A Claims Has Profound Legal And Practical Consequences For Petitioners' Case.

The government's Opposition attempts to minimize the impact of the retroactive application of 31 U.S.C. § 3731(c) on Petitioners, arguing that the relator would still be permitted to proceed with his claims even if FERA did not apply. Opposition at 10-11 ("[I]t is not clear how petitioners have been harmed. . . ."). The government's position that the ruling of the Court of Appeals "is of little or no practical consequence in this case" is belied by the government's continued efforts to preserve its stale claims. *Id.* at 10. There would be no reason for the government to persist in its efforts to resurrect these claims if it truly "does not matter" whether the government retries the claims or leaves them in the hands of the relator. *Id.*

And, of course, it does matter a great deal whether the government is allowed to pursue the claims asserted in its Complaint in Intervention. First, the government is wrong in describing its FCA claims as "substantially the same as the relator's." *Id.* at 10-11. For example, the government pleaded an alter ego theory of liability against Harbert Corporation, the passive owner of Harbert International, Inc. *See* Third Amended Complaint of the United States at ¶¶ 16-32. The district court, however, rebuffed the relator's attempt to add its own alter ego theory after discovery closed, reasoning that it would "unduly

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quantum or kind of evidence to convict – apply to changes to statutes of limitations. *Id.* at 611-12.

prejudice defendants" and would have required "even greater delay on top of discovery to allow the Court to assess whether the relator has successfully pleaded his alter ego theory as a matter of law." JAOR:0000254-255. In the event this Court rules that FERA may not be applied retroactively, only the relator's FCA claims would remain operative and – given plaintiffs' failure to muster any evidence of Harbert Corporation's direct liability during the 2007 trial – relator would be left to rely on his "enabling" theory of liability which, defendants have demonstrated, is plainly flawed. *See United States v. Bornstein*, 423 U.S. 303, 312 (1976).

Second, the substantial resources the government can bring to bear in a lengthy trial would undoubtedly give the relator a practical advantage that he plainly would not possess if proceeding on his own. *See E.E.O.C. v. Bd. of Regents of Univ. of Wisc. System*, 288 F.3d 296, 300-01 (7th Cir. 2002) (describing litigation against the United States as a "curse" because one "must square off against the power and majesty of the federal government" as compared to "an individual plaintiff, who almost certainly has limited resources"). The otherwise private character of the relator's claims would unquestionably be enhanced by the presence of the United States as co-plaintiff, particularly in a jury trial. *See United States v. Young*, 470 U.S. 1, 18-19 (1985) (recognizing that a government attorney bears the "imprimatur of the Government" and must be particularly cautious lest he "induce the jury to trust the Government's judgment rather than its own view of the evidence"). In sum, while it may be convenient for the government to argue here that it is of no "practical consequence" whether it remains a party on retrial, Opposition at 10, no one who has ever

tried a case against the government would find this argument even remotely plausible.

IV. The Government Waived Any Argument That Its Contract 20A Claims Properly Relate Back Under Fed. R. Civ. P. 15(c), Even Absent The Application Of FERA.

The government's Opposition correctly recounts that before FERA was enacted, the district court held that the government's 20A claims could proceed because they "related back" to the relator's 1995 complaint under Federal Rule of Civil Procedure 15(c). Opposition at 15. Petitioners challenged that ruling on appeal, arguing that the district court's Rule 15(c) holding was error because the lack of any notice of the relator's sealed complaint precluded relation back. Jt. Br. 31-40 (citing *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006)).

The government *conceded* the Rule 15(c) issue in the Court of Appeals – a fact that the government's Opposition neglects to mention. *See* Brief of Resp. at 24-27 ("Defendants' *Baylor* argument . . . is . . . irrelevant"). Rather than addressing Petitioners' argument that the reasoning in *Baylor* prevented relation back under Rule 15(c), the government instead argued that FERA's amendments to the FCA retroactively resuscitated the government's expired claims. Brief of Resp. at 24-27. The Court of Appeals for the District of Columbia Circuit did not dispute *Baylor*'s holding. Having opted on appeal ***not*** to address Petitioners' challenge to the application of Rule 15(c), the government conceded the point in this Court. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n. 4 (2002) ("Because this argument was not raised below, it is waived"); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address

this argument because respondent failed to raise it below and because the question it poses has not been adequately briefed and argued"). Indeed, even in this Court the government fails to cite, much less distinguish *Baylor*; nor does the government address *Baylor*'s holding that notice is the "core requirement" of Rule 15(c). 469 F.3d at 270.

Had the Civil Division of the Department of Justice investigated the relator's June 1995 allegations diligently and filed a complaint in intervention (or declined to intervene) later in 1995, Petitioners would have had the opportunity to prepare an effective defense. But the government's tactical delay of nearly six years before unsealing the relator's complaint resulted in the loss of Petitioners' principal witnesses to Alzheimer's disease, the fading of other witnesses' memories, and the intentional destruction of documents by government officials – a loss of evidence that defendants might have been able to preserve had they received timely notice of the claims and the opportunity to conduct discovery. *See* Petition at 6. Indeed, the six-year long sealing of the relator's complaint was not only incompatible with the core requirement of notice under Rule 15, but the district court recognized that Petitioners were demonstrably and grievously prejudiced by the unnecessary passage of time. *Miller*, 505 F. Supp. 2d at 19-20.

CONCLUSION

The government's FCA claims against Petitioners were time-barred until Congress added a relation back provision to the FCA while this case was on appeal following trial. The question presented here is whether Congress can revive time-barred claims in that way. It simply is not true, as the government contends, that the question – and the answer – do not matter. They do. Indeed, they matter a great deal not only to the litigants but to the public at large. For this reason, Petitioners respectfully ask that the Court grant their Petition and hear this case.

Respectfully submitted,

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